No.

United States Circuit Court of Appeals

For the Ninth Circuit.

ALFRED G. WILKES, E. BYRON SIENS, JOHN McKEON, ROBERT McKEON, MAURICE C. MYERS, WILLIAM J. CAVANAUGH, FRED SHINGLE and HORACE J. BROWN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record.

VOLUME 2

(Pages 705 to 1610, inclusive.)

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

No.

United States
Circuit Court of Appeals
For the Ninth Circuit.

ALFRED G. WILKES, E. BYRON SIENS, JOHN McKEON, ROBERT McKEON, MAURICE C. MYERS, WILLIAM J. CAVANAUGH, FRED SHINGLE and HORACE J. BROWN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record.
VOLUME 2
(Pages 705 to 1610, inclusive.)

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

(Testimony of Alfred G. Wilkes)

Exhibit J-A, the report by Eric A. Starke, Petroleum, Chemical, and Geological Engineer, dated May 15, 1928, on the Brownmoor Oil Company-Cauley Lease, known as Section 16 in the Kern front field, Kern County, California, contains many maps, plats and charts, and estimates a total gross receipts from the property of $28,945,400.00 less the cost of operation, development and royalties amounting to $14,054,146.00, leaving a net return from the oil of $14,241,260.00, and a present net worth with a 10 per cent discount factor of $4,225,835.00.

Exhibit J-B, the report by D. R. Thompson, Petroleum Engineer, dated May 14, 1928, on the same property, towit: On the Cauley lease of the Brownmoor Oil Company, places a present worth of recoverable oil at $49,740.00 per well, with an estimate of 60 wells, making a total of $2,984,400.00.

Exhibit J-A shows the fault line that Dr. Starke pointed out to me at that time. I saw a copy of the contract with the Standard Oil Company. The contract was dated the 14th day of December, 1927, between the Brownmoor Oil Company and the Standard Oil Company of California whereby the Standard Oil Company agreed to purchase not to exceed 10,000 barrels of oil produced from the Cauley lease in any one month, or not more than 3,000 barrels per day and to pay therefor the sum of 75 cents per barrel, said oil to be of a gravity not less than 14 degrees. The contract was signed Brownmoor Oil Company, E. Byron Siens, president and Howard Shores, secretary.

(Testimony of Alfred G. Wilkes)

At about the time Italo Petroleum Corporation of America executed the contract with the Brownmoor Oil Company the cash position of the Italo Company was pretty bad. Vincent had assured me that he would have no difficulty in immediately selling the 300,000 units for which he had subscribed. We were depending on that money to carry on the work on the Brownmoor property.

Vincent came to me the latter part of April and asked me when we were going to sign the Brownmoor contract. I said "I'm not going to sign the Brownmoor contract until I am sure that we will have the money on hand to take care of our obligations and to take care of the drilling that is going on. You have not been paying any money into the treasury of the company rapidly enough to justify us signing that contract." He said, "I am sure if we can get that contract signed that I can, with that new property added to what we have, and with the Continental drilling there, I will have no difficulty in raising the money." Vincent and Stratton were both in the office at that time and were very anxious for me to close the Brownmoor contract. I told them that we would have to be sure of raising at least eighty to a hundred thousand dollars before we could afford to sign the contract. About three or four days later Vincent came in the office and said "Well, things are going very slow, but I think I could arrange to borrow $80,000 over a period of time and then I could pay it back out of the sales of the company's stock". I said "Well, if you can, just so you assure me that the company is not going to be in a hole, and if you can assure me that we will get the money, the contracts are all ready, I will get them signed up and

(Testimony of Alfred G. Wilkes)

completed and we will take over the property". In that same conversation I suggested to Vincent that we go over and see Fred Shingle and see if we could not interest him in becoming interested in the company to the extent of helping finance the operations. The latter part of April we went over to see Shingle whom I had known for a long time. He had been associated with me in the Commonwealth Petroleum Company, representing his brother Bob Shingle of Honolulu. Vincent and I went over to see Fred Shingle, and I told Fred about what the company had and what our plans were about taking over these other properties and wanted to know if he would be interested. What we particularly wanted to do was to raise $80,000 or $100,000. Fred said that he did not think that they would be interested; that the only oil financing that they had ever done had been the bonds of the major companies, but that he would talk it over with Brown and for us to come and see him again the next day or two. A day or so later Vincent and I went over and saw both Shingle and Brown and told them what we really needed was to borrow $80,000 and asked them if they could not arrange to advance us that money. Brown asked me what we would give as security, and I told him that we would give the company's note. I told him about the well that was being drilled on the Wiley-Tobin lease that ought to be coming in any day, and that we had every prospect of making a great deal of money. I told him that we would give him the company's note. He wanted to know how long we wanted to borrow it for, and I told him at least a year, to be safe we didn't want to have any immediate obligations due. I gave him a description of the properties

(Testimony of Alfred G. Wilkes)

and he said that he would investigate them and let me know whether he was interested or not. Three or four days later I went over again and he told me that they had investigated them, that the properties looked very good, and he had gotten very good reports, and that they would loan the Italo $80,000 but wanted to know what we could offer them for the loan. Vincent at that time had options on this Brownmoor stock and agreed at that time to give them 80,000 shares of the Brownmoor stock as a bonus for the loan and they assured me right then that I could go ahead and close up the contract; that the money would be available whenever I needed it or before, at least before the end of May when we would need money on the first of the month. At that time Vincent was dealing with Siens and I think that as an actual fact the stock was borrowed from Siens because Vincent had not yet got delivery of the stock which he had under option. The 80,000 shares of Brownmoor stock were promised to Fred Shingle by Vincent. Vincent told Shingle, and I perhaps told him too that if we were able to complete the Brownmoor deal and purchase the Brownmoor property, if we get this money and were able to complete the deal, that the Brownmoor would receive this Italo stock and that eventually the Brownmoor stock would be exchanged for Italo stock. Vincent was very much enthused in getting Brown and Shingle interested with him in the deal in the Italo Company and Vincent said "Now, I have an option on a lot of this Brownmoor stock, I believe the Italo with the development that is going on on Signal Hill on this 10-acre lease, and if we get the Brownmoor property, the Italo stock is going to become very valuable stock.

(Testimony of Alfred G. Wilkes)

I think I am going to make some money out of my options on this Brownmoor stock, and if I do I will declare you in with me on it."

The deal was closed then and I went ahead and closed my contract with the Brownmoor.

Just after the deal was completed or about that time Vincent and Stratton both came to me and said "things are not going, stock is not moving as rapidly as we thought it would and we have undertaken to pay something over $100,000 for this Brownmoor stock, and while we have made the original payment we are liable to forfeit our payments, but if we can carry this thing through, and don't you think that you could get Masoni and Perata to come in with us and help us buy the Brownmoor stock". I said, "I don't know whether I could or not. You know, they do not have a great deal of confidence in you personally because of some other transactions that they have had with you, but I will talk to them and see what I can do." I got Masoni and Perata in my office and told them that "Vincent had his option to purchase the Brownmoor stock and that there were some pretty heavy payments falling due, and that he wanted them to come in with him and help him buy this Brownmoor stock, and I think it is a very good thing for you to do. You have a lot of money invested in the Italo American now and things are just looking now as though they are going to be a success and there is a chance for you to go in with Vincent and buy this Brownmoor stock, and that will mean eventually that you will get some Italo stock out of it." Perata was inclined to do it but Masoni was against it because of

some prior deals that he had had with Vincent, and he finally said, "Well, every time we go in with Vincent on any of these syndicates or things, we have gone in with him on a couple of syndicates to buy up Italo stock and so forth and every time we do we always have difficulty with him." "Well", I said, "I don't see how you could have any difficulty about this if you go in with him on this stock. It will be a simple matter of purchasing Brownmoor stock, and you will get what you are entitled to under the Brownmoor deal". After much discussion they finally agreed that they would go in with Vincent and purchase with him the Brownmoor stock provided I would see personally that they were protected and that the stock was handled in a way so that I would see that they were protected, because they didn't want to deal with Vincent. I sent for Vincent, and he came in and I said, "Now, Vincent, Masoni, and Perata will go in with you on the purchase of that Brownmoor stock but only on the understanding that that is to be handled by me, and that I am to see the thing all the way through" and with that understanding we did go into it.

The Italo Company had not received the $80,000 from Fred Shingle at the time of this conversation. Money was coming in very slowly. With the announcement of the Brownmoor deal the situation apparently changed over night. Vincent started to sell a tremendous amount of stock right away, and shortly after we got the $80,000 from Shingle Vincent started to pay on his 300,000 units so that we were able to pay the money back to Shingle almost immediately. At the time we incurred the obliga-

(Testimony of Alfred G. Wilkes)

tion I made the arrangement to borrow the $80,000 from Shingle the company was practically without any cash.

During the time that I have been in the oil business I have had extensive experience in the fixing of values of oil properties with a view of purchasing them. I have bought a great many oil properties in California since 1910. I accumulated all of the properties of what was first the Commonwealth Petroleum Corporation by acquiring the Western Union property located at Santa Maria, and consolidated a lot of properties, and purchased a lot of properties for the Commonwealth Petroleum Company, and negotiated the purchase by that company of the control of the Union Oil Company of California. I have investigated properties in Texas, Kentucky, and a great many other places and was finally one of the organizers with the Commonwealth Petroleum Company and of the Union Oil Company of Delaware which is now the Shell-Union Company of California. There was never any property that I had anything to do with that concerned any stock offered to the public except through the medium of a stock exchange that bankers might have offered afterwards. The United Western Company was a consolidation of properties which belonged to McKeon and myself and was a closed corporation. We formed a small syndicate in 1914 with Bob Shingle, Fred Shingle's brother, and raised about a half a million dollars to buy additional properties. Practically every agent that sold oil properties presented his properties to me during that period of time and that is how I contacted the Santa Maria property belonging to the Hellmans of Los Angeles and known

as the Western Union property. That property called for the payment of $1,750,000, and I communicated with friends of mine and associates in New York and through them arranged for the financing of the properties. A syndicate was formed in New York of which Percy Rockefeller, Mr. Sabin of the Guaranty Trust and Mr. Perkins who was recently made head of the National City Bank, were members, and this underwriting syndicate put up $1,750,000 for the property and $750,000 for working capital. That was an underwriting syndicate very similar to the Fred Shingle syndicate. The same thing was done with the Union Oil of Delaware later which required an investment of $30,000,000 which was raised through an underwriting syndicate very similar in detail to the one involved in this case. In connection with this syndicate I purchased all of the properties together with Mr. Lockhart who was representing the bankers. That property is consolidated with the Shell Company and is now known as the Shell-Union Company of California.

At the time the Brownmoor deal was closed in the early part of May, 1928, a great many different properties were being presented to me. Upon the closing of the Brownmoor deal Vincent made a success of financing with the result that purchase rights were issued to the stockholders and they were all taken up within a very few days. We saw it would be possible to finance a consolidation of a good many properties and decided on a group of properties in Coalinga, and on a property in Signal Hill known as the Edwards property. Some time about the middle of May, 1928, I started talking to the McKeons with reference to

their property and showed them an outline of what I had in mind.

In the latter part of May I discussed with Fred Shingle the question of organizing this big underwriting syndicate, which as I remember it, required about $2,000,000 in cash. Then we changed the plan and left the Edwards property out and put the Graham-Loftus property in, and that required in the neighborhood of $3,500,000 in cash, and a considerable amount of stock which was going to different companies which we purchased. Vincent said that he would have no difficulty in his opinion in raising that amount of money, that he didn't know whether he could raise it fast enough, and we couldn't take any chances, and having been educated in the syndicate method of financing, the syndicate was formed at my suggestion. I had negotiations with Mr. Edwards concerning his property which was located at Long Beach and Signal Hill, and wanted to get an option on the property and finally did arrive at a contract with Edwards and paid him $25,000 in cash, and one of the wells that was drilling came in a water well. By that time I was negotiating with Robert McKeon on the McKeon Drilling Company's property, and he wasn't very keen for the Edwards property, and he advised me whether I did business with him or not to drop the Edwards property. About that time I started negotiations with Mr. Loftus for the Graham-Loftus property, and that seemed a much better buy than anything Edwards had, so we changed from the Edwards property to the Graham-Loftus property. The $25,000 paid on the Edwards property was subsequently lost to the company.

(Testimony of Alfred G. Wilkes)

The Graham-Loftus properties consisted of a number of leases on Signal Hill, the main property being called the Frog Pond and they had a production then of about 5000 barrels a day and were drilling two or three additional wells. My recollection is that they were producing between 4,000 and 5,000 barrels a day. We finally agreed to purchase the Graham-Loftus property for $3,000,000 in cash. We were to pay them $1,000,000 in cash within 30 days, and then the balance was to be paid at the rate of $166,666 a month. The deal was on the basis of buying 100% of the stock of the Graham-Loftus Company. We had under consideration a number of properties, and as I remember it we had tentative contracts on a very definite group of properties in the Coalinga field.

When we finally arrived at our final set up which included all of the properties named in the application there of July 5th, and knew exactly what our cash obligations were, I talked with Vincent, Shingle and Brown with reference to the organization of this larger syndicate. Vincent was very active in it too and was anxious to have the consolidation go through. Quite a large sum of money had been paid on a good many of the properties. This was probably in the latter part of June. The cash needed to pay on these properties did not come from the Italo Company, but came from the syndicate, from Fred Shingle as syndicate manager. To the best of my recollection, by the middle of July Shingle had paid in in the neighborhood of half a million dollars, perhaps more.

This time I talked about the McKeon properties being acquired by the Italo Company was in the latter part of May. I first went to see Jack McKeon and during the

(Testimony of Alfred G. Wilkes)

course of a conversation I asked him why he did not merge his property into this thing and make a big real operation of it and for the boys to get in and run it. He said "As you know, I am tied up here at the Richfield, we have a very satisfactory operation as it is, and I doubt very much whether Raleigh and Bob would be interested. Besides that, I doubt very much if you could finance as big an operation as you are undertaking." I told him the whole story, just what we had on hand. And I said "I am sure I can satisfy you. You know I have financed things bigger than this before, and I am satisfied it can be financed through the underwriiting syndicate, through Vincent. Vincent is down here and I will bring him over to see you." So I went back that afternoon and took Vincent with me and we had another long session and it was largely on the question of financing. The wind up of that conversation was that Jack said, "Well, you, go and see Bob, for he is running the McKeon Drilling Company, and discuss it with him and if you can arrive at any arrangement with Bob, I will not oppose it. It looks like it might be interesting."

Jack 'phoned Bob and I went over to see him. I had a long talk with Bob McKeon, but he wasn't particularly interested. After talking to him for awhile he said "I will arrange a meeting between Jack, Raleigh and myself and yourself. I can't get Raleigh today because he is down at the field, but I will try and arrange it tomorrow evening." So the next day I saw Bob again and arranged to meet that evening at the Biltmore Hotel. That meeting was about May 25, 1928. We spent the whole evening and I outlined to them exactly what we would have. It

looked as though we would have one of the largest independent producing companies in California, and with their ability to operate the field end of it, Bob, Raleigh and Jack all being experienced practical oil men, having an experienced staff of men on the field end of it, and I considered their properties more valuable than the Graham-Loftus because they were better situated, and at that meeting that night Raleigh and Jack were rather inclined to accept the proposition and come in with us, but Bob wasn't quite satisfied. He wanted to look at the properties I had a little more, and either that night or the next day before I left Bob finally said, "Well, I am going to investigate these other properties that are going in, if they look all right and I am satisfied you can go ahead with this deal, we will consider the proposition. But one thing that I will insist on, and that is that we want at least $1,000,000 in cash, in addition to enough cash to pay our present obligations, which are in the neighborhood of half a million dollars, and then if we are going out of business for our selves, we have just a small company with the three brothers, and we don't have any trouble, and we do as we please, and we are doing very well, and if we are going to lose our identity and become identified with another company and devote the rest of our lives to it we have to have a very substantial stockholding." He said that he would insist, in comparing their property with the others that they would insist, on at least one-third of the stock in distribution for the different properties. That is, he wanted one-third of the outstanding stock of the Italo Company. I told Bob I thought that was impossible, that I didn't think I could get my associates to

(Testimony of Alfred G. Wilkes)

accept that deal, and asked them at that time to write me a letter, setting out just exactly what the properties were and what the income had been for that year up to that time, and that I would go back then and discuss it with the other people, the other directors, and the other people interested, and then I would see them again on my next trip. He wrote me a letter outlining those properties. This is the letter dated May 31, 1928, which was written to me by Robert McKeon.

The letter was received in evidence and marked Defendants' Exhibit K, and is in substance as follows:

Letter dated May 31, 1928, from McKeon Drilling Company by R. S. McKeon to the Italo Petroleum Corporation of America describing the properties and leases, wells production past and present of the wells, and enclosing valuation report of D. R. Thompson showing the valuation of the properties of the McKeon Drilling Co. Inc. to be $9,500,188.00 based upon the prospective income to the McKeon Drilling Co. over a period of seven years after deducting the cost of drilling and operation. It further stated that the properties of the McKeon Drilling Co. were all in proven territory and that in view of the character of the leases purchases by them the production should be in excess of 10,000 barrels per day gross by the end of June, 1928. Further stating that the personal property as appraised April 30, 1928, as per balance sheet was $168,922.54; that further moneys were spent for personal property in May; that the net earnings of the company for the first four months of 1928 from four producing wells was $300,280.93 and that the May earn-

ings should approximate $150,000; that there were then four producing wells and others drilling.

After I received that letter I went over it very carefully with Masoni, Perata, Fred Shingle and Horace Brown. They were all of them very anxious that we try to work out some deal with the McKeons because they all realized the value of the organization besides the value of the properties earning at that time then $100,000 a month. I came back to Los Angeles about the latter part of the first week in June and at that time went to the Graham-Loftus people and practically completed my deal with them. We had been negotiating for some time and had gotten down where they wanted $4,000,000 to start with and finally got them down to three and a half million, and on this trip I got them down to $3,000,000 price which I agreed to pay them. Then I went over and told Bob McKeon that I had made this deal with the Graham-Loftus people, and he was more interested in the proposition than he had been before. About this time we expected to issue 10,000,000 shares of stock for all of the properties and then when we took on the Graham-Loftus property we had to increase that to 12,000,000 because we had 2,000,000 cash obligations and the difference between the Edwards property and the Graham-Loftus property. By the time we had really got down to a definite deal on the McKeon property it was on the basis of 12,000,000 shares being issued. With reference to the demand of the McKeon Company for one-third of the outstanding total stock of the Italo Petroleum Corportaion of America, that amount was changed. We made two or three changes in

(Testimony of Alfred G. Wilkes)

the final arrangements with McKeon. In the first place I wanted to do away with the $1,000,000 cash. I said to Bob "You don't need $1,000,000 cash, and since you are going to get it, what is the difference? Our credit is perfectly good and we will assume your obligations, and we will pay you half a million dollars in cash and half a million dollars over a period of time, and we will give you four and a half million shares of stock.

From the time of the one meeting that we had in the Biltmore Hotel, when Bob, Raleigh and Jack were all present, I never had any other meeting with them. I was seeing Jack in between times about different things, but he was pretty busy, and I think practically all of the negotiations were from there on carried on with Bob McKeon. I know that neither Jack nor Raleigh were ever at any meeting with Bob after the first meeting. We started to prepare the contracts and get ready to get reports, and we had quite a time drawing the McKeon contract. Myers drew one and Bob's attorney drew one and there was work back and forth and finally we arrived at a contract that was satisfactory to both of the attorneys, and upon the completion of the McKeon deal that completed our program, and we then prepared our application to the Corporation Commissioner.

I went over to the Corporation Department to see Mr. Abel, who was then the Chief Engineer of the Corporation Department. I do not remember the exact time, but it was prior to the filing of the application. Abel was a very experienced oil man and familiar with oil properties and I wanted to outline to him just exactly what I had and to get from him the names of engineers who would be satis-

factory to the Corporation Department. Myers went with me to see Mr. Abel and I asked him to give me the names of three or four engineers who would be satisfactory to him in reporting on the valuations of these properties. He gave us the names of three different engineers, one was a Mr. Thomas, one was a man by the name of Soyster, and I do not remember the third man's name. He said "Any one of these three will be satisfactory to us. In other words, I will take the report of any one of these three men." Soyster was unavailable at that time and was connected with one of the companies we were purchasing, and I did not know Mr. Thomas, but I told Abel I thought that Thomas was the best man for us to take, and I immediately got in touch with Mr. Thomas and put him to work making an absolute valuation of the properties we had, and we had reports on a lot of properties, and I think on the Graham-Loftus property that I had a report Dr. Starke made for me, and had consulted with him during my negotiation with the Graham-Loftus people, and I had a great deal of confidence in Dr. Starke because of our past relations.

In regard to the purchase of the McKeon Drilling Company properties, I never had any understanding or discussion with either Robert McKeon or any of the other McKeon officials that the stock consideration to be paid to the McKeon Drilling Company was to be only two million shares of the capital stock of the Italo Petroleum Corporation of America. It was not discussed on that basis. I never had any understanding, agreement or discussion with anybody to the effect that of the 4,500,000 shares of Italo stock paid to the McKeon Drilling Company as part

of the consideration for its assets, that 2,500,000 shares of that stock consideration was to be a secret profit, and was to be divided among the directors of the Italo Petroleum Corporation. I had no discussion with anybody relative to the payment by the Italo Corporation to anybody in any other company that we were discussing the purchasing of whereby any officer of that company or any other individual not entitled to it was to receive any compensation. The stock consideration of 4,500,000 shares was arrived at in the manner that I have testified to. That did not represent quite one-third of the outstanding capital stock but was a compromise situation which we arrived at in our negotiations. All of those negotiations were conducted between Robert McKeon and myself and no one was ever present at any meeting that I know of except Robert McKeon and myself, and except the one meeting I told you about when Raleigh and Jack were present until we got to the point where the lawyers were brought in to draw the contracts. Those negotiations and dickerings with Bob McKeon over the McKeon property continued over a period of probably six weeks before I was able to get him to sign a contract.

I think that all the contracts were drawn but of course they were all subject to the approval of the Corporation Commissioner.

From about the middle of June on, the syndicate that I spoke to Fred Shingle about was under way. Frederic Vincent & Company was the fiscal agent for the Italo Petroleum Corporation of America. During the latter part of May Vincent began to pay for the 300,000 units that he had contracted for and subscribed to buy; during

the month of June we issued the rights to the stockholders which were sold to the stockholders direct and were taken up very rapidly and money was coming in at this time quite rapidly. Up to the time the McKeon contract was closed about July 5th, I think Fred Shingle, syndicate manager, had advanced somewhere in the neighborhood of half a million dollars. As of August 9th, which was the date when the Corporation Commissioner issued the permit for 12,000,000 shares I think that the syndicate had advanced in excess of $1,000,000. I think about one million and a quarter. The money was advanced by the syndicate and all the syndicate had were those contracts to purchase the property. It was rather a complicated situation in that there were some cases where we were buying properties outright like the McKeon and Graham-Loftus properties, and in some cases we were exchanging stock, perhaps in some paying some cash and offering stockholders of the old company stock in the new company in exchange for their stock; so in figuring the thing out and talking it over with Shingle a trustee was appointed to receive all of the stock which was issued under this permit, and then the trustee was to carry out the different contracts and in cases where a certain amount was absolutely necessary for acquiring some stock he didn't acquire, in which cases he was obligated to turn back to the Italo Petroleum Corporation what stock he still had left in his hands.

After the permit was granted on August 9th, I went back to San Francisco and had a talk with Vincent and Shingle and outlined with them the plan that Vincent was going to pursue in selling the stock. Then I left on the

18th of August for New York. Exhibits 83 and 84 were executed by me on behalf of the Italo Corporation and reflect the disposition by the trustee of the total 12,000,000 shares of capital stock of the Italo Company issued under the August 9th permit.

Mr. Shingle accompanied me on the trip to New York. I had already been in correspondence with some of my old associates in New York, those who had been associated with me in the Union Oil and Delaware Company, and in the Commonwealth, and explained to them this company which we have to see if they would be interested in coming in with us through this syndicate or through the financing of the company. Some of them were interested but the main group that I really wanted to interest told me that it was not big enough, that the three and a half or five million issue was not big enough to justify the expense that they would be put to, and that in addition to that they would want the organization changed from a dollar per stock to a no par stock. They also told me that if I would return to California and acquire some additional properties and perhaps a refining connection they would be very much interested in undertaking the underwriting of the securities. I also contacted a couple of people for Vincent who said that Vincent was going to carry on some operations there in New York. The purpose of my trip was to interest these former banker friends of mine who had been in in these other big companies with me.

While I was there I received several wires and letters stating that things were not going very well in Los An-

geles, so I returned to California, and got back to Los Angeles on September 18, 1928.

On September 20th we had a payment due to the Graham-Loftus Company of $600,000. We had already paid them in excess of $600,000 and had already paid for something over $340,000. The stock of the company was in escrow and if it had been withdrawn we would have forfeited our money we had paid, and also lost the properties. When I was in San Francisco, before I left for New York, in making the agreement between Fred Shingle, the syndicate manager, and Frederic Vincent & Company, who were going to sell the syndicate stock, I had been specific with Shingle to be sure that it called for sufficient cash before September 20th, to take care of that $600,000, and when I heard that the money was not coming in and knew this payment was due on the 20th of September, I hurried back to Los Angeles as fast as I could. On the night of September 19th I received a telephone call, in the middle of the night, from a field man at Signal Hill that the Graham-Loftus Company had brought in their Lightner No. 4 well, which was reported to be the largest well in the field. He said it was doing better than 5,000 barrels per day. Up to that time I had not been so terribly worried about the Graham-Loftus payment because I felt I could go over to them and pay them part of it and get an extension for at least 30 days or two or three weeks until we had time to move, but with that well coming in, in my opinion it pretty nearly doubled the value of the property and I was very much afraid that they would take advantage of the contract, forfeit what we had paid and

(Testimony of Alfred G. Wilkes)

take back their property. I immediately rushed over to John McKeon on the morning of September 20, 1928, the date the payment was due, and told Jack exactly the situation. I told him that we were in an awful fix on the Graham-Loftus payment and there was between $600,000 and $700,000 with interest due, that the big well had come in down there, and that if we did not make the payment we were just going to be in a bad spot. I told him how things had lined up in New York, and I was satisfied that we could thoroughly finance the whole situation, if we had a little breathing spell, but Vincent & Co. had fallen down in taking up the stock that they had been supposed to take up by September 15th. They were supposed to pay for 300,000 units before September 15th. So Jack said, "Well, I will see what I can do." He went out and went around all morning and came back and said, "Well, now, I can borrow $300,000 of it, and I can borrow another $300,000 by putting up 2,000,000 shares of Italo stock and by having Fred Shingle sign the note as syndicate manager." He said "as a matter of fact it is all on my endorsement, but I have seen Mr. Lacy and he is willing to help us out too, so he did arrange to borrow that $600,000, and in the meantime I had rushed over to see Mr. Loftus and finally got him at his house and he came down and said that he was not going to take any snap judgment on us, and that there were a lot of other interested stockholders besides himself and he wanted us to live up to it as close as we could.

He said "if it is all there by tomorrow afternoon, that will be all right." We made the payment and Jack

(Testimony of Alfred G. Wilkes)

McKeon was the man who went out and got the money for me and became liable on the note. I was present at a conversation with Jack McKeon and Horace Brown when Brown 'phoned to Shingle in San Francisco about putting up these 2,000,000 shares of Italo stock. Shingle questioned his authority as syndicate manager to pledge the 2,000,000 shares and Jack says "Well, never mind worrying about your authority. We have got to have it, but I will hold you harmless, in case anything happens to this 2,000,000 shares this money will be paid off, and I will see that the 2,000,000 shares is returned to you out of my own personal stock." The question of the McKeon Drilling Company only receiving 2,000,000 shares of stock for consideration of their properties was never discussed by me with anybody and I never understood at any time that the McKeon Drilling Company was only to receive 2,000,000 shares of stock. I never had any conversation about the McKeon Drilling Company only receiving 2,000,000 shares of stock for their assets with Maurice C. Myers, and never heard it discussed until I came into this courtroom. I never saw Exhibit 116 until I came into court.

After the payment was made on September 20th, 1928, I went to San Francisco and immediately got in touch with Shingle and Vincent. I called Vincent into the office immediately after I got there and asked him how it was that he had not been able to or had not sold sufficient of that stock to take care of the 600,000 payment. He said that he had sold a lot of stock but it was on the partial payment plan and he had not the money.

(Testimony of Alfred G. Wilkes)

When I arrived at the office I found from Mrs. Lyle, Cavanaugh and other people in the office that there had been continual complaints coming in, and I received some myself from persons who said they had purchased stock in the Italo Company from Vincent, that it was fully paid for, and they were unable to get their stock. I asked Vincent about it and he said "That is just people we have not got around to deliver the stock to yet." I said "Well, if you delivered all those people the stock you must have the money and I don't see why you could not make the payment. He said, "Well, we did the best we could." I then saw Shingle and discussed the situation with him and on my way back I stopped at the Bank of Italy on the corner of Montgomery and Pine streets to see Jack Skinner, who was vice-president of the bank and an old friend of mine. I asked Jack to let me know what the balance of Frederic Vincent & Company was at the bank on that day and he said "Well, it is not customary and it is really against the rules but I will tell you if you keep it confidential." So he went over to a window and brought back a slip and showed me that they had on deposit that day in the Bank of Italy considerably over $400,000. I went back and saw Vincent and told him that I knew that he had sold a lot of stock and that the company was not getting the money for it, and the syndicate was not getting the money for it, and in addition we had innumerable complaints from stockholders and that in addition there were a dozen or fifteen people coming in every way with Cal-Italo stock thinking it was the Italo stock and wanting to exchange it for Italo. I told him that he had promised me that when he formed the Cal-Italo Company that the

stock was to be held by he and Stratton and that he was not going to sell any stock in it. That he, Vincent, was out soliciting Italo stockholders to exchange their Italo stock for Cal-Italo stock and it was causing a lot of trouble and so far as I was concerned although I had stood by him against the advice of Masoni and Perata that I was through with him. I told him that I thought that he was going to do this job but instead of that he was not trying to help the company at all; that he was just trying to help himself. He said that he had a contract for the sale of the stock and that it was beginning to go up now and that they would pay for that stock before the time was up. I told him that his contract was already canceled so far as I was concerned; that it was up to Fred Shingle and that I had specifically required that he pay for 300,000 units on or before September 15, but that he had not done it and that if Shingle would follow my advice he would cancel his contract. I went over and had several talks with Shingle-Brown over a period of a week or ten days and told them that Fred was familiar with the line-up I had in New York, and "If we get this thing in the right kind of shape, we would have one of the best companies in California. We have a beautiful income here and we have got great property if we handle the thing properly." After about ten days Shingle-Brown agreed that they would discuss the matter with some other stock exchange members of San Francisco relative to going into the Italo and underwriting the stock to get the cash in. About the first week in October they told me that they did have three or four different firms who were ready to go into the situation, but that they insisted on

(Testimony of Alfred G. Wilkes)

two things, first, they insisted that Vincent be entirely eliminated from the company, and not allowed to sell stock at all, and I said "That is absolutely up to you because the only stock there is for him to sell is the syndicate stock. You have the right to cancel his contract and all you have to do is to cancel it." He said, "Well, I don't want to do that until I am sure these other people will go ahead and besides it might cause some trouble." I came to Los Angeles with Fred Shingle, Plunkett of Plunkett-Lilienthal, and Mr. Miller of Geary-Meigs & Company of San Francisco. The other thing they insisted upon was that Jack McKeon become president of the company and take over the complete management of it We met a representative of some Los Angeles stock exchange firm here and Jack McKeon came over to the hotel and met the gentlemen. They said "We are going to look over the properties, we have seen the income statements and we know the set-up pretty well, but we are only willing to go ahead with this thing if we are satisfied after our investigation that you are willing to become head of the company. You have a reputation in California and we know you are an oil man and we have seen the work you have done, and if you will become head of the company and everything looks *all-right* to us on this trip we will take over the financing proposition." Jack at that time told them that it was impossible for him to then leave the Richfield; that on his advice they had bought a lot of properties in Signal Hill and were carrying on a big drilling campaign and it would not be right for him to leave them at that time. He said he thought he could get a man to become president of the company

who was just as capable as he was and who knows a lot about the oil business and his management would be perfectly satisfactory to them in every way, and that he would get his brother Robert to come over and take actual charge of the field operations. He said he would go down and see Mr. Lacy and believed that he would take the presidency of the company and manage it. McKeon told them who Lacy was; that he had been the president of the Chamber of Commerce, and was interested in different interests and familiar with the oil business. Later Jack came back and said that he had had lunch with Lacy and that Lacy had agreed to be president. The brokers said they wanted to look into it a little more, and also go over the properties and would let him know in a few days. They were very much pleased with Mr. Lacy going into it, and I think some of them had a talk with Mr. Lacy and then agreed they would undertake the situation. On this trip I realized that we were going to have a very serious time with Vincent. Before I left San Francisco he avoided me and had been discussing how much money he had lost and what a lot of work he had done, and now that the thing was getting good we wanted to shove him out of it. I told Jack of this situation and he said "Well, the only thing for you to do is to get rid of him, that is all. You have got to get rid of him in some way." So I went back to San Francisco, and Shingle immediately agreed to notify Vincent that his contract was canceled and that he could not sell any more stock.

When Vincent received the notice he asked me "What am I going to do about all of this stock I have sold on the partial payment plan." I told him that so far as I

(Testimony of Alfred G. Wilkes)

could see he had traded most of it into the Cal-Italo Company. I asked him how much he was still short, and he said "Well, I am short about 100,000 units, that is, that I have sold on the subscription plan that I will have to deliver." I said, "All right, I will talk to Shingle about it and arrange to get that 100,000 units of stock for you. I don't know just what your price will be or anything about it, but I will arrange for you to go over and see Shingle, and I will see that you get enough stock to cover that stock but don't sell any more stock." I went over to talk to Fred about it and he said we would take care of him to the extent of the stock that he had sold. He asked me how much stock he had sold and I told him I did not know except what he had told me and that was that 100,000 shares would cover it. I said "Yes, 100,000 units, I think, will cover it." I went back and told Vincent what I had arranged upon and for him to go and see Fred and agree on the price of the stock, and about a day or two later Vincent came into the office and said that the 100,000 shares was not going to be enough to take care of the amount of stock that he had to have. He said he really did not know how much stock he had to have, and that he would have to check up and find out. He said "What about who is going to pay for my losses in the market?" I said, "What do you mean, your losses in the market?" He said, "I have been protecting the market on this Italo stock and it has cost me a lot of money." I said, "If you lost any money in the market, bring your statements in and let's see what they are, what you lost." He said, "I don't keep those statements, but I lost a lot of money." I told him I didn't know what he was going

to do about it and if he would check up and find exactly how much he was short and what he had to have to deliver I would see that he got the stock from Shingle because we didn't want people who had purchased stock through him complaining. I said, "You have been identified with the company for two years, and I also find you have been out using cards as representative." I found that out before I told him to stop. I said, "I find you are still continuing to send your salesmen out with cards claiming to represent the Italo Petroleum Corporation. You know they are only salesmen for Vincent."

I had a talk with Shingle and told him that Vincent said he was short more than 100,000 units and suggested that they send Byers, who was Shingle-Brown's auditor, over to audit Vincent's books and make him show every subscription he had and see just exactly what his position was. Shingle sent Byers over and he spent a couple of days there and came back and said it was impossible for him to check the books of Vincent, and tell what his position was. This was about the 18th or 19th of October, when Byers came to Shingle and myself in Shingle's office and said that he could not check the books and advised Chingle to *H*ave Haskins & Sells go over and check the books. I did not hear anything more about it for a couple of days, and finally got a telephone call from Moe McInerney, Vincent's attorney, who told me that if I was not in his office before 3:30 that afternoon a suit would be started before 5 o'clock. I went over to see McInerney and he asked me what I was going to do about the Vincent stock. I told him we were trying to get it straightened

(Testimony of Alfred G. Wilkes)

out as best we could, that Byers was trying to find out just how much stock he sold and had not been delivered and how much stock he had under contract that had not been delivered and that as soon as I could find out we would see if we could not arrange to take care of those subscriptions. He said, "What are you going to do about those losses he had?" I said, "He has not shown me he has had any losses. I don't know where he is going to get any stock." He said, "Somebody is going to take care of it and I will give you 48 hours in which to get this matter straightened out and if it is not straightened out to Vincent's satisfaction I am going to start suit against the Italo Company for damages." That Vincent was the fellow who made the company and had been its fiscal agent at all times and had gone to a lot of expense and had lost a lot of money and if it was not straightened out within 48 hours he was going to start suit against Fred Shingle, Syndicate Manager, to stop him from selling any of that stock. I called Vincent then and asked him what the idea was in hiring an attorney and told him that if he wanted to talk to anybody again that he would have to talk to our attorney. As soon as we could find out what his position was we would see what we could do about taking care of him. He said that he had to have something to pay him for his losses on the market. I asked him how much he figured he ought to have to cover his market losses and he said they were pretty big; that he did not know, but that he had carried the thing along for two or three years and was now being shoved out and that he was going to have something out of it.

(Testimony of Alfred G. Wilkes)

I went to Los Angeles immediately and about the 20th, 21st or 22nd of October I saw Jack McKeon and told him everything was going fine with the exception of the fact that Vincent & Company was threatening to file a lawsuit and bust the whole situation up.

I had a long distance call from San Francisco stating that something had to be done. So at that time McKeon said, "Well, I will tell you what I will do. Go back and make the best deals you possibly can with him and whatever deals you have to make I will just have to take care of it personally. That is all there is to it. If we have to give him some little stock to take care of him, why sell him some stock at a cheap price, I will have to do it." So I went back to San Francisco and found that Vincent's account had been audited and that he was something over 400,000 short of stock, a lot of which had been fully paid for and a lot of it partially paid for. We had several meetings back and forth and finally it was agreed that Jack would give him 125,000 units of his stock, and that we would sell him enough balance out of the syndicate and out of McKeon's to make up the amount that Vincent had sold. Shingle as Syndicate Manager on account of options that he had given to other brokers could only supply a certain amount of that stock which Vincent needed. We did not trust Vincent to deliver the stock upon payment of cash, so had him bring all of his subscriptions over and deposit them in the Bank of Italy with a list of the people he had sold the stock to and what they had paid and whether they had made partial payment or made any deposit of that money. The stock was put

in escrow in the bank so that the people who were entitled to it could come there and get it. I think that was closed up some time in the first part of November.

Jack McKeon and I had several discussions about the New York people and about reorganizing the Italo Company, changing the par value of the stock, and acquiring some different and additional properties and doing our financing the way we had always done it through the New York banks. About the time the brokers agreed to take on the financing of the company, Jack McKeon told me that I could tell Shingle and Brown that if they took hold of the situation and cleaned it up and got these properties paid for and got the company in financial shape and raised the three and a half million dollars that was necessary that he would see that they got some compensation.

My understanding with Jack McKeon was that he had agreed that as soon as he could gracefully get away from the Richfield Company he would take charge of the Italo Company, and he told me that he wanted me to step out of the management of the Italo Company and devote my time and attention to the reorganization, and we would get the thing in shape and that he would be able to get away from the Richfield by the first of the year or very soon thereafter and that they would get the thing properly organized and properly financed. I then communicated with New York and a Mr. DeShadney, a representative of Palmer & Company, arrived here early in November. We met with Jack and immediately started looking over several different properties. We started negotiations

with the Wilshire Oil Company and with the Dabney Johnson and the Delaney properties down at Signal Hill. DeShadney stayed here about a month and plans were practically completed to go ahead with the reorganization including these other properties.

The Wilshire, the Dabney and the Delaney properties were to be financed. While DeShadney was here he wanted to know what proportion of the underwriting would be undertaken by the western banks and he went up to San Francisco and spent two or three days there talking to Shingle-Brown. At that time the plan was to issue 10,000,000 of debentures in order to acquire the properties, long term debentures, and Shingle-Brown at that time agreed to take half of the 10,000,000. After this was agreed on Mr. DeShadney went to New York about the middle of December and then returned again. Jack put in his resignation at the Richfield to take effect on February 1, 1929, and DeShadney returned here with a man by the name of Lyons, a lawyer, and an accountant came out in the latter part of February to make an investigation of the properties. We had several agreements with the Wilshire Oil Company, but were never able to get them in writing, and on the Dabney Johnson property, we paid $200,000 in February 1929, and $10,000 on the Delaney property. When I say "we made the payment" on these properties I mean that I am not speaking of the Italo Company; that that was paid by McKeon and myself personally. With reference to the Dabney transaction in lieu of the payment of 200,000 in cash which was the option price, or down payment demanded, a million shares

of the McKeon Drilling Company's stock was put up as security for the note. That may have been $250,000 instead of $200,000. With reference to the $10,000 in cash paid on the Delaney deal, that money was received from the sale of some of the McKeon stock. About the time we got this thing closed up with Vincent and along about the 1st of November, Jack told me that he had arranged with his brothers, Raleigh and Bob, that he and I would go to work on the reorganization and refinancing of the Italo Company and acquiring of those additional properties and that he had arranged with them to use any part of the McKeon Drilling Company stock that he saw fit in the securing of these properties and the carrying on of the program and also for his own personal use. He told me that some time between the time that the brokers' syndicate was formed from October 15th and the first of November.

With reference to the receipts that have been put in evidence acknowledging the receipt of certain numbers of shares of stock for efforts in financing and organizing and furthering the interests of the Italo Petroleum Corporation of America, I know that when Lacy was elected president of the company on October 16th that he insisted that some of his other friends go on the Board of Directors with him and on the Executive Committee, and at that time Fred Keeler was elected a director to replace one of the Italian members of the board and Frank Chapin, an experienced oil man, Hugh Stewart, who had been associated with Lacy as vice-president of the Farmers and Merchants Bank, and some others went on the Board at that

time, and the operating offices of the company were being moved to Los Angeles and there was a feeling among the Italian stockholders and among the Italian members of the Board that it was sort of being taken away from them and that they were being shoved out of the company. About the first of November I could see that Perata and Masoni were no longer active in the company, and I told Jack McKeon that I thought it would be a very good thing, that I did not want those boys to become dissatisfied because they were going to be very valuable to us in more ways than one, and that they had worked hard on the thing and could do us a lot of good particularly if we could get into the refining business and the distribution of it and we want to keep these Italians in it and we want to keep them interested, and I suggested to him that he give them some of his stock. There was no special amount mentioned, but the next time I was down here I asked Jack whether I should tell Masoni and Perata that they will get some of this stock that he was willing to use for his new company. And he said "Yes, go ahead and tell them. What do you think we ought to give them." I said, "I don't know," but I think I said "Well, give them about half the amount we gave Vincent, it will do no harm and I think it will be a good thing." So he told me to tell them that he would give them 62,500 units apiece. Those are the only two that have been mentioned here that I talked to McKeon about except Shingle and Brown. That is the first time that I ever discussed any division of this stock and it was not McKeon Drilling Company stock but was Jack McKeon's personal Italo

(Testimony of Alfred G. Wilkes)

stock which he had received through some arrangement with the McKeon Drilling Company which was to be used for his own personal benefit and for the purpose of organizing this new company. Neither Perata nor Masoni had the slightest idea that they were going to get any stock until I told them so some time in the middle of November.

I knew that Mr. McKeon had some large property holdings at San Bernardino, a business property, and also a ranch, and that Mr. Siens handled those properties for Mr. McKeon.

In 1926 and 1927 I was interested in the theatre business, running some theatres for my brother who had become sick. When the San Francisco Theatre failed it owed the government some $18,000 in theatre taxes which had been reported but which had not yet been paid. In 1928 the government wanted me to pay this tax. While I was president of the company I had never had the handling of the money, or anything to do with the management of it, and was only comparatively a small stockholder. My interest would have amounted to about 20 per cent of the whole thing. I offered to compromise the thing with them and I think I offered to pay them 35%, whatever my proportion was, but they refused it, and one day I was indicted for this theatre tax business, and on the advice of my attorney I went up and compromised the thing and pleaded guilty and they fined me $18,000, whatever the tax was, and the penalties, on which I have paid $15,600 and still owe them $3,000. I made two trips to New York with regard to the reorganization of the Italo

(Testimony of Alfred G. Wilkes)

Company. Lyons came out from New York. Before he left there the deal had been agreed upon. He knew what the properties were, had the engineers report. All that was left to be done was to go back to New York and close the contract. When Lyons was here he wanted to make the reorganization and enlarging the Italo Company even larger than we had contemplated. Mr. Brown came down from San Francisco and had several meetings with him, and again agreed that the western bankers would take whatever part of it they wanted them to up to $5,000,000. It was then that Lyons suggested that the company should be called something besides the Italo Petroleum Company, stating that we did not want to localize it, and that everyone knows about McKeon, that he has a big name throughout the country, and suggested that we call it the McKeon Oil Company to identify it with an individual. Jack went back to New York with him, I think, about the 10th of February, and I was working at this end of it getting up auditors' reports, and earning reports of these different companies. I got a wire that they wanted an engineer's report made on the whole situation by Bob Moran, and after the report was made, I did make one trip to New York, but only for a few days. After Lyons was out here I was looking after the western end of it and Mr. McKeon was staying in New York practically all of the time, so I was back there very little. Mr. Lyons and he came back I think on two different occasions after that. The money that was spent by McKeon and myself on the reorganization of the Italo was all McKeon's money, although I was acting as his agent in handling it, when the final settlement came after the crash in the fall of 1929

(Testimony of Alfred G. Wilkes)

it cost us over half a million dollars. A million shares were put up to secure the note to Dabney Johnson which were lost and we had to pay a deficiency judgment of $250,000.

Jack McKeon lost a ranch which cost him in the neighborhood of $100,000, there was $10,000 paid to Delaney, $10,000 paid to O'Donnell, and including the attorneys' fees, accountants' fees, engineers' fees and expenses, and one thing and another, it ran up in the neighborhood of half a million dollars. That was money that was derived from the sale of the stock received by John McKeon which had been paid to the McKeon Drilling Company by the Italo Petroleum Corporation of America in payment of the properties of the McKeon Drilling Company.

DIRECT EXAMINATION

BY ATTORNEYS FOR MASONI AND PERATA.

All negotiations for acquisition of property by the Italo Petroleum Corporation of America was carried on by me, and I would say from some time in November 1927 on I was entirely in charge of the affairs of the Italo American. The agreement between the McKeon Drilling Company and the Italo Petroleum Corporation of America was dated July 5, 1928 and was prepared in Los Angeles between Mr. Myers and the McKeons attorney. The contract was prepared before either Masoni or Perata ever saw it, and neither of them had anything to do with the preparation of it. I was consulting with them and they depended very largely on my advice.

(Testimony of Alfred G. Wilkes)

CROSS EXAMINATION

BY MR. SIMPSON

FOR SHINGLE AND BROWN

I first met the defendant Horace Brown after my first talk with Fred Shingle in the spring of 1928. That was following my first conference with Fred Shingle when Vincent was present relative to the making of the $80,000 loan. In that conversation Shingle told me that he would discuss the matter with his associate Mr. Brown and if I returned in a few days he would talk with me further about it. When I returned in a few days is the first time I met Brown. In those various conversations we had with Shingle and Brown relative to the $80,000 loan Vincent and myself told them that the Italo Petroleum Corporation needed the $80,000 very badly in connection with the acquisition of the Brownmoor property. Brown asked what security the Italo Company would be able to furnish as collateral for the making of the loan and was advised by Vincent or myself that the Italo Corporation had the Wiley-Tobin lease on Signal Hill with two producing wells and that they had a dehydrating plant at Long Beach and that these would be put up as security on any loan that was made. Brown stated that he would like an opportunity to look into it and find out what the adequacy was of the security that was being offered, and that if he thought it was adequate he would advise me later as to whether they would be interested in forming a syndicate for the purpose of making the loan. Vincent and I had a half a dozen or so conversations with Shingle and Brown in which Vincent stated that he had a great interest in the

(Testimony of Alfred G. Wilkes)

company and in the securing of this $80,000 loan because he had some options on Brownmoor stock. Vincent said he expected to make a profit out of the options he had on the Brownmoor stock if we were able to complete the deal with the Brownmoor and it was necessary to get this $80,000 to complete it. With respect to dividing any portion of Vincent's profit with Shingle and Brown with respect to the Brownmoor stock, Vincent said "Now, if I can put this thing through and acquire this property, I will split with you on anything that I make out of this Brownmoor stock, these options that I have".

He did not say how much. These conversations took place in the latter part of April.

After these conversations I saw Shingle relative to obtaining a loan of $10,000 for the purpose of acquiring a lease commonly known as the Cat Canyon lease. There was an opportunity to pick this lease up and I went over to see if Shingle and Brown would not be interested in taking the lease. I told them that Frederic Vincent was willing to lend $5,000 of the needed $10,000 and asked them if they would lend the additional $5,000 that was necessary to make up the $10,000. Shingle and Brown inquired what security could be furnished for the $10,000 loan and I told them that I would put the lease in the name of Fred Shingle and in addition thereto deposit 80,000 shares of stock as collateral for the $10,000 loan, and I also told him in my opinion the lease was a very valuable lease.

In connection with Exhibit 141 which is a letter dated May 8, 1928, addressed to Shingle, Brown & Company,

(Testimony of Alfred G. Wilkes)

referring to 80,000 shares of Brownmoor Oil Company stock to be held as collateral for $5,000 loaned by Shingle, Brown & Company, and $5,000 loaned by Frederic Vincent & Company. The 80,000 shares of stock referred to in that letter was the 80,000 shares of Brownmoor Oil Company stock that was subsequently deposited as collateral security for and the bonus on the $80,000 loan. In the early part of May, 1928, Shingle, Brown & Company agreed to head a syndicate to loan the $80,000. They committed themselves to do this verbally before the written agreement, Exhibit 142, was executed. They agreed to furnish the $80,000 prior to the time that the Brownmoor contract was signed and I believe it was signed on May 2nd. In the discussions that were had between Vincent, Shingle, Brown and myself, Vincent stated to Shingle and Brown that he, Vincent, would arrange for and secure the putting up of the 80,000 shares of the Brownmoor stock. He told them that he was working with the Brownmoor stockholders and it was to his interest to obtain the $80,000 loan for the Italo Petroleum Corporation so that the options that he had on the Brownmoor stock would become of some value and it was stated that Vincent was selling the stock of the Italo Corporation on the partial payment plan and that he would therefore need time within which to sell the stock and get the money in for the benefit of the Italo Petroleum Corporation and for that reason they would require the loan for a period of six months to a year. Vincent said he thought he could do it within six months without any trouble, but I insisted on a year's time. As the result of these negotiations the loan was made for a period of a

(Testimony of Alfred G. Wilkes)

year but with the provision that it should be repaid in four equal installments in three, six, nine and twelve months. Under the agreement between Shingle and the syndicate members each certificate for 20,000 shares of stock would be drawn down and distributed ratably among the syndicate subscribers upon the repayment of that installment.

The loan agreement was made and drawn by the attorneys for the Italo Petroleum Company, Melvin & Sullivan. With respect to the agreement in evidence between Fred Shingle, Trustee, and the syndicate subscribers, dated the.....day of May, 1928, it is stated "that whereas it is to the interest of certain individuals that said corporation obtain such loan, and whereas said individuals have now in their possession and have agreed to transfer, assign and deliver to said trustee 80,000 shares of the capital stock of the Brownmoor Oil Company, a California corporation, as partial consideration for said loan of $80,000 to be made by the trustee to said Italo Petroleum Corporation of America," the "Certain individuals" mentioned in the agreement must have been Frederic Vincent & Company.

The Italo Petroleum Corporation of America never agreed to, could not and did not pay any Brownmoor stock as a bonus for the making of the $80,000 loan.

With reference to the testimony of Mr. Stratton, I did not have a conversation with him about May 1, 1928, and I did not tell him at that time that I wanted Frederic Vincent & Company to purchase or finance the purchase of options on the Brownmoor stock. I did not have a

conversation with Mr. Stratton in which I stated to him that I had optioned a block of stock of the Brownmoor Oil Company from Mrs. Cooper and a block of stock of 100,000 shares from E. M. Brown, and had made a deposit of $1,000 on each option. All of the transactions with reference to the purchase of the Brownmoor stock were carried on by Mr. Vincent direct with Mr. Siens. I did not deliver to Mr. Stratton the Cooper option, Exhibit 140, nor the Conlon assignment. I did not have a conversation with Mr. Stratton, as testified to by him, in the presence of Mr. Vincent about May 1, 1928, and did not tell him that I was in a position to option an additional 250,000 shares of the Brownmoor Oil Company stock from E. M. Brown, but needed $10,000 to get the option, and they did not tell me that they would be willing to lend $5,000 if Shingle, Brown & Company would loan the other $5,000 to option this stock, and I did not state that there was 80,000 shares of Brownmoor Oil Company stock available to be put up as collateral. The $10,000 that was discussed between Vincent, Stratton and myself was relative to the borrowing of that sum in order to buy up the contract for the acquisition of the Cat Canyon lease.

I did write Stratton a letter covering the purchase of the 420,000 shares of Brownmoor stock. I did not have a conversation about May 20, 1928, with Stratton and Vincent, and did not tell them that the Italo stock on the E. M. Brown option was then being distributed, and that there had been an error made in the stock, and that I was checking it up and as soon as I got it finished I would make the necessary adjustment in the matter and deliver their shares. I did not tell them that there was another large

block of stock that was going to be sold through Shingle, Brown & Company, or that any adjustment made on the Cooper-Brown contracts was to be made at the time that the big block of stock was sold through Shingle, Brown & Company, or that I would adjust the price so that it would equalize.

I never at any time or place told Stratton or Vincent that a large block of the Italo stock issued or exchanged for the Brownmoor Oil Company stock was to be sold through Shingle, Brown & Company.

Exhibit 171 is signed by me and was written at the request of Stratton, who wanted some evidence of the fact that Vincent & Company were the owners of so much Brownmoor stock and would under the ownership of the Brownmoor stock be entitled to so many units of Italo stock. At the time I wrote the letter Exhibit 171, May 28, 1928, Vincent & Company had paid for 100,000 shares of Brownmoor stock. According to Exhibit 171, Frederic Vincent & Company had purchased or agreed to purchase 550,000 shares of Brownmoor stock.

With reference to this language in Exhibit 171: "As soon as these purchase contracts are completed, you will be entitled to receive the 450,000 shares of Brownmoor stock or its equivalent in Italo Petroleum Corporation stock. The distribution of this stock will be in accordance with our understanding." I meant that Masoni and Perata had a half interest in the purchase of that stock and that they had gone into the transaction simply on my assurance that they would be protected as I have heretofore testified. Upon the basis of the exchange of Brown-

moor stock for Italo stock, the 450,000 shares of Brownmoor would be the equivalent of 270,000 units of Italo stock, the basis of exchange being five to three or ten to six.

Out of the 270,000 units of Italo stock issued in lieu of the 450,000 shares of Brownmoor stock, 40,000 units of Italo stock were issued in lieu of 80,000 shares of Brownmoor stock, which had been delivered to the $80,000 loan syndicate as its profit. This left a remainder of 230,000 units of Italo stock, and I told Vincent and Stratton that Masoni and Perata were entitled to half of that stock, less what the cost had been to them.

Vincent and Stratton took the position that the 100,000 shares of Brownmoor stock referred to in my letter of May 28th, or its equivalent of 60,000 units of Italo stock, had been purchased by them, and that Masoni and Perata had no interest in it. I told them that my understanding was that Masoni and Perata were as much entitled to an interest in the 100,000 shares as they were in the 450,000 shares, and we had considerable argument about it.

With reference to Certificates No. 984 and No. 985, aggregating 230,000 units of Italo stock, being part of Exhibit No. 37, I told Mrs. Lyle that when the Brownmoor stock was ready for distribution to put the 230,000 units in Fred Shingle's name until some settlement had been made with Perata and Masoni with reference to their interest in the stock. This was so I could carry out my promise to protect Masoni and Perata. I did not discuss the matter with Shingle before having the stock placed in his name, but I may have told him that I was going to

(Testimony of Alfred G. Wilkes)

have it put in his name as a matter of accommodation. Those 230,000 units of Italo stock never belonged to Fred Shingle or to Shingle, Brown & Company or any member of that firm, and none of those persons had any interest in those units at all. Those certificates representing those 230,000 units of stock issued in the name of Fred Shingle should never have been delivered to Frederic Vincent & Company, because that was against my instructions. I never saw the check for $83,000 dated June 11, 1928, made payable to Shingle, Brown & Company, concerning which Mr. Stratton testified. I never received that $83,000 check from Stratton, never returned it to him or asked him to issue a check for a like amount payable to the Montgomery Investment Company. I had nothing to do with the transaction at all. Stratton never at any time or place told me that the $83,000 check was in payment by Frederic Vincent & Company for the 195,417 units of stock concerning which I have just testified. I do know about the check for $24,750.00, dated June 11, 1928, being part of Exhibit 149. Vincent told me that he was delivering that check and would later deliver another check to the Montgomery Investment Company, as he was going to sell the stock and that he wanted to purchase Masoni's and Perata's interest in the units. I told him that was a question that would have to be taken up with them, because I did not know whether they wanted to sell or keep their stock. He told me that he delivered the $24,750.00 check. The $24,750.00 check was not delivered by me to Shingle, Brown & Company or the Montgomery Investment Company, in payment for any portion of the 195,417 units of stock to which we have just referred. I know

about the check dated June 12, 1928, for $44,092.92, part of Exhibit 150. To the best of my recollection, that check was delivered by me to the Montgomery Investment Company. Vincent told me that these checks represented a profit out of the purchase of the Brownmoor stock, and I said I knew nothing about that, that he would have to make some accounting to Masoni and Perata with reference to that stock. That check was delivered to Shingle, Brown & Company with instructions that they deposit it subject to my direction and control.

Defendants' Exhibit E, in the handwriting of George Stratton, refers to Stratton's and Vincent's purchase of the Brownmoor stock and to the Italo stock which they received through the purchase of the Brownmoor stock. By that I mean the 450,000 shares of Brownmoor stock referred to in my letter of May 28, 1928, which would be the equivalent of 270,000 units of Italo stock. The reference in Defendants' Exhibit E to 34,583 units, one-half V group, refers to the Vincent group, and the reference 34,583 units one-half M group refers to the Masoni and Perata group. I knew afterwards that the 69,167 units, Shingle-Brown, $83,000 cash, referred to in Defendants' Exhibit E, was the settlement Vincent made with Shingle, Brown & Company in pursuance of his agreement that he would divide or split the profits with them that he made on the Brownmoor stock, as I have heretofore testified Vincent stated to Shingle he would do. Neither Fred Shingle, Horace Brown nor Axton Jones, nor the firm of Shingle, Brown & Company had any interest whatsoever in the 34,583 units of Italo stock bearing certificate number 984 and part of Exhibit 37. The check for $44,092.90,

(Testimony of Alfred G. Wilkes)

Exhibit 150, was not in payment to Shingle, Brown & Company for that stock. I had no personal interest in the purchase of the Brownmoor Oil Company stock, but it was all the stock of Frederic Vincent & Company.

I was not present at the time Stratton purchased the stock belonging to Siens, Westbrook and Shores.

With reference to the 250,000 shares of Brownmoor stock owned by the Monrovia Oil Company, I had told Siens that we would not purchase the Brownmoor Oil Company property and assume the $100,000 obligation which was owed to the Monrovia Company on the Brown lease at Inglewood. Sometime during the negotiations Siens told me that he could get rid of it by selling the Monrovia stock, and asked me if I thought Vincent or anybody would be interested in purchasing it. He also told me that Mrs. Cooper was anxious to sell her 200,000 shares of Brownmoor stock, so I put him in touch with Vincent, and all of the negotiations for the purchase of the stock were carried on between Siens and Vincent. I knew nothing until afterwards just what the negotiations were.

The David Garvey account with Shingle, Brown & Company was originally the account of W. J. Cavanaugh. About the time I was handling the settlement with Masoni and Perata, I instructed Shingle, Brown & Company to put that money in the David Garvey account, and to keep it there until the settlement was made with Vincent. David Garvey is William Cavanaugh's step-father.

The reference in Exhibit 267, stating, "If you are approached by brokers who advise you to sell your stock or

exchange it for some other stock, we feel you should be warned against such advice as the development during the next sixty days should add largely to the value of your Italo shares," refers to the plan of interesting eastern capital in the company, as I have heretofore testified, and also to the fact that many of Vincent's salesmen had been telling Italo stockholders that Cal-Italo was a holding corporation for the Italo Petroleum Corporation and would thereby trade them stock in the Cal-Italo company for their Italo Petroleum stock.

CROSS EXAMINATION

(By Mr. Abrahams)

Prior to July 5, 1928, the date the contract was made with the McKeon Drilling Company, the only assets the Italo Company had were those that it had acquired from the Italo-American and from the Brownmoor Company. The Italo stock issued prior to that time had been sold in accordance with the Corporation Commissioner's permit, at $1.50 per unit, less a 15 per cent selling commission, which left a net of $1.27. Both the preferred and common stock were $1.00 par value, but the company only received $1.27 for a share of common and a share of preferred, which represented one unit. The preferred stock was preferred both as to assets and income.

In the conversation that I have testified I had with the three McKeon brothers, relative to the sale by them of the McKeon Drilling Company properties to the Italo Company, they did not even intimate that they were willing to sell their properties, but only that they were willing to consider the deal. I never at any time had any con-

(Testimony of Alfred G. Wilkes)

versation with any one of the three McKeons or all of them, in which any price was suggested by them or any willingness on their part indicated to accept a lesser consideration for the McKeon Drilling Company properties *that* the consideration which was eventually provided for in the contract. The least price ever suggested by them that they were willing to accept for their properties was the $500,000 assumption of indebtedness, the $500,000 in cash, and the giving of ten notes, payable over a period of ten months, for $50,000 each, and 1,000,000 shares of preferred and 3,500,000 shares of common stock of the Italo Company. They never accepted the deal as finally set up until it was finally agreed upon. I told them that the company was selling its stock at $1.27 for a share of preferred and a share of common. Vincent's original idea was to sell a share of preferred and give a share of common as a bonus, but I didn't like that idea and arranged it on the unit plan. I had a great many discussions and conferences with Bob McKeon in respect to the purchase of the McKeon Drilling Company's properties prior to the making of the contract. Bob McKeon was very hard to deal with. He told me that they had a business that was paying them approximately $100,000 per month, which belonged to the four McKeon brothers, and that they thought they had a pretty nice thing and preferred to keep it. He was very much opposed to losing the identity of the McKeon Drilling Company, and figured they had a business that would be paying them much more than $1,000,000 per year, and had no stockholders outside of themselves, or directors to interfere with them, and that it was just a family party. At that time the McKeon

(Testimony of Alfred G. Wilkes)

Company had probably the best organized field force in California, consisting of approximately 200 men. This field organization was one of the main things that I was seeking to get, because it was really a continuation of the organization which Jack McKeon and I had had in the old drilling days. As far as I know that organization is still operating the Italo properties. The negotiations that were being carried on between Bob McKeon and myself for the purchase of the McKeon properties were brought to the attention of the board of directors of the Italo Company, and the board of directors all knew that Bob McKeon was one of the principal owners of the McKeon Drilling Company. The making of the deal with the McKeon Drilling Company had been discussed with the Italo directors in and out of meeting many times, and the consideration that was to be paid for the McKeon properties was communicated to them and known by each one of the directors who was present at the meeting of July 6, 1928, when the contract was finally confirmed. I never at any time made any suggestion to any of the Italo directors that if they voted for the McKeon contract they would be paid for it in some way. No promise of any kind was made to any one of the Italo directors, either a defendant in this action or not, that if they would vote for the McKeon contract they would be compensated for so doing. No such suggestion was ever made to any one by me or by any one else in my presence. No coercion or threats were used on any of the directors to get them to vote for the transaction. So far as I know, each of the directors voted in accordance with his own best judgment,

and at the time I made the transaction I believed that it was beneficial and vital to the Italo Company.

At the same time I was negotiating with quite a few other concerns, and it was largely true that those other concerns, at least some of them, refused to go into any transaction unless the McKeon properties were included in the deal. The Shingle-Brown group and Shingle refused to consider any syndicate without the McKeon group, without the McKeon properties going in, and I was looking to Fred Shingle to handle the syndicate. I inspected the properties before we bought them. During my twenty years of experience in the oil business I have examined practically every oil property in California except perhaps the major companies' properties, with an idea of buying or selling the properties, and have bought a great many properties.

After I checked up on the McKeon properties I talked with Dr. Starke about them. After I had agreed to purchase the properties I talked with C. S. Thomas, at the suggestion of the Corporation Commissioner's office, and employed him to make a valuation report. After I made an examination of the properties I formed an opinion as to the value thereof. In buying oil properties, that is, producing, proven properties, an engineer's valuation does not greatly influence me, because I can see what a property is producing, and I have had enough experience to know pretty well myself what I think their value is. In my opinion the McKeon properties were the most valuable properties that we had under consideration. I considered that if we could get the McKeon properties at the prices

we were negotiating on with the McKeons coming into the organization and taking stock, that we were getting a big bargain, and my opinion was not influenced by my hope or belief that I would be personally rewarded in any way for making the transaction. In my belief the McKeon properties were worth the money being paid by the Italo Company to the Italo Corporation. I desired to build up a company which I intended to spend the rest of my life with.

Up to the time that the contract was made between the McKeon Drilling Company and the Italo, Bob McKeon had not been active at all in the Italo affairs. He had never attended a directors' meeting up to that time. Prior to that time a contract had been made between the Italo and the McKeon Drilling Company for the participation of the Italo in a well that was being drilled by the McKeon people on shares. Prior to the making of the McKeon-Italo contract I only had one conversation with Raleigh McKeon, and that was the night that we had the meeting with the three brothers and myself. None of the negotiations for the deal were had with Raleigh McKeon. At the time the transaction took place, the McKeon Drilling Company was very active in the drilling of new wells, and I think that at that time they had six wells drilling, which were on properties that were afterward acquired by the Italo Company. I never had any dealings with Jack McKeon regarding the purchase of the McKeon properties after my first talk with him, although I talked with him several times regarding their properties and saw him about the Graham-Loftus property, and obtained the

opinion of Jack McKeon and Mr. McDuffie as to the value of the Graham-Loftus property.

Between July 6 and August 9, 1928, I never had any conversation with any of the McKeons with respect to the disposition of the stock which under the terms of the contract the McKeon Drilling Company was to receive. Neither did I have such a conversation with any of the McKeons up to the time that the stock was actually issued and delivered to the McKeons. When I first became connected with the Italo-American in 1927, none of the McKeons were interested in the company in any way or connected with it. The first of the McKeons who became interested in or connected with the Italo Petroleum Corporation of America was Robert McKeon, when he became a director in March, 1928, and his connection with the company was inactive up to the time that the contract was executed July 5, 1928. Bob McKeon really was never active until October 15, 1928, when he moved his offices over to the Italo offices and took active charge of the field operations. Neither Jack McKeon nor Raleigh McKeon had anything to do with or was connected with the organization of the Italo Corporation of America.

All of the $80,000 borrowed by the Italo Corporation of America actually went into its treasury, and all that the company paid for the loan was the principal of $80,000 plus the seven per cent interest for the time that the company had the money.

None of the McKeon brothers had anything to do with the Brownmoor deal. I did discuss the Brownmoor deal several times with John McKeon to get his advice regard-

ing the properties, but did not promise him any compensation for the advice. He advised me against taking the Brown lease at Inglewood, stating that in his opinion they would never find a deep sand there, and that they were on the very edge of the upper sand. He stated that he believed the 600-acre lease in Kern River front was a very valuable asset, and that we could build up a production of five or six thousand barrels a day in a very short time. He said that if we were getting a good rental for the refinery it was a valuable asset. At that time the refinery was leased for $90.00 a day.

About the same time I talked with Jack McKeon about the Brownmoor property I discussed it with Dr. Starke, who made a report on the property. His report or opinion of the valuation of the property conformed to that of Mr. McKeon, and Dr. Starke had no interest in the Brownmoor Company and received none of the consideration that the Italo Company paid for the Brownmoor property.

Don Thompson, geologist for the Richfield Oil Company, examined the Brownmoor properties and made a written report on them, which is in evidence.

I remember having seen this letter dated March 29, 1928, signed by D. R. Thompson, addressed to Frederic Vincent & Company, regarding the Brownmoor property. Thompson had no interest in the Brownmoor Corporation and was not promised any reward for making the report.

I considered that if the Italo Company could purchase the Brownmoor properties for anything in the neighborhood of a million or a milion and a half dollars, they were

making a very good buy. The 600,000 units of stock issued to the Brownmoor Oil Company were the same kind of units that were being sold for $1.27½ per unit. There was never any agreement to give the two and a half million shares of Italo stock or any part thereof that was to go to the McKeon Drilling Company to any of the officers or directors of the Italo Company.

Sometime in the early part of 1929 the Farmers & Merchants Bank were pressing the Italo Company on its loan, one of their contentions being that the McKeon properties didn't belong to the Italo Company, and thereupon the McKeon Drilling Company waived its lien in order to turn the properties over to the company, so they became the properties of the Italo Company, and the McKeons were then in the position of ordinary creditors and the Bank obtained those properties as security for the Italo's obligation.

CROSS EXAMINATION

BY MR. WEST:

A Masoni's position with reference to the Vincent purchase of the Brownmoor stock was that he was purchasing the stock and wanted to retain it when he got the Italo stock, and as a result of the deal Vincent & Company or myself directed the transfer of certain credits to Shingle, Brown & Company. Masoni retained 21,000 shares of stock in lieu of any cash price. Perata preferred to sell his stock, from which he received $25,000. Neither Perata nor Masoni knew or were advised by me as to the mechanics of the bookkeeping transaction by Vincent & Company whereby they turned the credit over to Shingle, Brown & Company.

(Testimony of Alfred G. Wilkes)

FURTHER

DIRECT EXAMINATION

BY MR. WOOD:

If the Court please, the court will recall in the presentation of the Government's case there were certain features in which the ruling of the court was that as to those things they would be binding only upon the particular defendant mentioned. Now, Mr. Wilkes himself figured in some of those matters, and in my direct examination of Mr. Wilkes I purposely avoided any reference to those chapters of the Government's case, because I felt that the other defendants probably wouldn't care to indulge in any examination of those things, and when all of the matters upon which Mr. Wilkes could testify involving any of the other defendants was over with, that I would then ask your Honor to allow me to examine Mr. Wilkes further on those particular things only.

A Mr. E. Tropp was a general broker in San Francisco who handled a great many transactions for us. He bought and sold Italo Petroleum Corporation stock and we paid him for his services. I met H. L. Bentley in Los Angeles after he had been selling stock for Vincent & Company and after the acquisition of the properties under the July permit he wanted to get an agency here to continue selling for Vincent. Siens brought him in, and at his request I told him I would endeavor to get him the agency from Vincent. I had no interest whatever in the activity of Mr. Bentley or the International Securities Company or the proceeds of the sale of the stock by that company.

(Testimony of Alfred G. Wilkes)

At the time I met Mr. Goldstein he was doing some advertising work for Doremus & Company.

With reference to the testimony of Mr. Hanes of the Farmers & Merchants National Bank, Mr. McKeon in the spring of 1929 instructed me to send down 200,000 shares of his stock to the bank, which I did, through Mrs. Lyle. I knew that the stock was being used as security for a loan, but did not participate in any way in the proceeds of that loan. With the exception of Mr. Biagini and Mr. Godfrey, I do not know any of the stockholders that the Government has produced in court to testify. I know Mr. Louis Lurie but never owed him $19,500. He had been helping me in connection with the Italo Company and promised to do a great deal in connection with the Fred Shingle syndicate. He had also sent a number of properties over to me, and I had agreed that if I did business on any of these properties I would see that Mr. Lurie was taken care of. He received the 9000 units not on any particular property, but for general services in connection with what he was going to do for me in connection with the company. I asked Lurie while he was down here if he would send down the original note to me and he said he would, but he has not sent it down. I have no recollection of ever signing Exhibit 276 for Mr. Lurie. I asked him for the original note and he has promised to send it down but has not done so. I understand that he has gone to New York and that Mr. Edwards, his secretary, has gone to Honolulu.

The witness Toomey has done work for me for a great many years. He and I were working on the consolida-

tion of some Coalinga properties prior to the time that I went into the Italo Petroleum Corporation, and he had brought many properties to me. His office is with mine in San Francisco. He gave me a receipt for the stock, the Italo stock, that he received. Toomey did not get the stock when he was working for me on the merger of a big company, but he said to me, "Now, I want to ride along with you on this company. You use this in connection with it, and when the thing is completed, why, take care of me." This is the receipt that Toomey gave me for the stock.

The receipt was received in evidence and marked Defendant's Exhibit M, and is a receipt signed R. E. Toomey, acknowledging the receipt of 30,000 shares of common and 27,000 shares of preferred stock of the Italo Petroleum Corporation of America, from A. G. Wilkes.

Mr. Behr came to me in June or May of 1928 and wanted to sell me what is called the Jackie Coogan properties. I told him I would be very glad to look into them and then talk about a deal. I had Mr. Westbrook go down and investigate the properties, which he did, and reported back to me that the wells were absolutely no good, that two of them would have to be redrilled, and that none of them was in good condition, so the next time Behr came I notified him I was not interested in the properties. I heard Mr. Behr's testimony concerning the payment of some $30,000 for the purpose of bribing the Corporation Commissioner of this State, and such testimony is not true. I never at any time gave Mr. Behr or anybody else any money to bribe any public official in con-

nection with the affairs of the Italo Petroleum Corporation of America. Sometime in July Behr came to me and said, "I understand you are having some trouble with the Corporation Commissioner over there, and I think I can help you," and I said, "Well, you are only about the fortieth or fiftieth person that has come to me and told me they thought they could help me, and we don't need any help. If we are entitled to our permit, we will get it. Mr. Myers is handling it and that is all the assistance we will need."

With reference to Exhibit 297, showing 400,000 shares of stock chargeable to me, I never received that stock. Sometime in 1929 when I was in Los Angeles Robert McKeon asked me if I was talking to San Francisco to have them send down 400,000 shares of their Italo Petroleum stock, as they wanted to make a loan at a bank, and when I was talking to San Francisco that day I asked them to send the stock down, and they said the stock was sent down to me at the Biltmore Hotel, and when I received it I gave it to Robert McKeon or else delivered it to the McKeon Company office. It is my recollection they said they were making a loan at the Citizens National Bank, but I did not retain any portion or part of that 400,000 shares of stock.

I remember Mr. Cavanaugh's statement in Exhibit 277 to the effect that $72,000 was one-fourth of the $288,000 that Frederic Vincent & Company had paid for the remaining trust interest in the contract dated May 31st, wherein Frederic Vincent & Company bought the Italo convertible features of the 500,001 shares of the capital stock of the Brownmoor Oil Company. The situation

relative to Mr. Cavanaugh in that respect is this: He approached me several times when I was down here, while I was working on the Italo-American job, and I told him that when I finished with it I was going back in the oil business again, and asked him to be on the lookout for some good properties. Sometime in January or February, 1928, he spoke to me about the Brownmoor properties, stating that he had met Mr. Siens in Jack McKeon's office, and that it looked like a very good property. I told him at that time that the company was not in any shape to consider it, but to keep it lined up and as soon as I was finished with what I was doing I might be interested in it myself. Later on we decided to enlarge the Italo Company and go ahead with it, and I told Cavanaugh that we would be interested in the Brownmoor Oil Company, and went over with him to see Mr. Siens. I asked him if he had any understanding with Siens as to what commission or compensation he was going to get if the deal went over, and he said he had no definite understanding, so I stated to him that he had better arrange a definite understanding so he would know just what he was going to get. He afterwards told me that Siens had told him that if Cavanaugh could make this deal that Bentley would give him the 100,000 shares of stock that had stood in Bentley's name.

The first time I talked with Siens about the Brownmoor deal was probably in the latter part of March. In examining oil properties I am not in the habit of examining the book values of the properties, and I made no examination of the books of any corporations, including the McKeon Drilling Company and the Brownmoor Oil Com-

pany, in regard to the valuations of any asset that I had under consideration. I might ask them to give me a statement showing their earnings over a certain period of months and their obligations, but that is all I would be interested in. Their books would have no effect on the value of the properties so far as I am concerned. I never saw the books themselves containing information as to the assets or liabilities of the company as set up on the company's books.

CROSS EXAMINATION

(By Mr. Redwine) I pleaded guilty to the felony relating to the tax transactions of the Wilkes theatres, concerning which I testified on direct examination. That related to theatre tax money that had been collected by one of the Wilkes theatres and had been reported to the Government but had not been paid to it. I was not in control of that theatre and signed no checks on the theatre at all. I was advised by my attorneys to plead not guilty and fight the case as they said there was absolutely no chance of the Government to convict me on the charge, but I pleaded guilty because I wanted to get rid of the matter and did not want to go through a long trial. I was fined the amount of the tax, which was about $18,300 and some dollars. I paid fifteen thousand three hundred and some dollars and was unable to pay the balance, so Judge St. Sure gave me three years to pay that balance, and when the first payment was due, which was sometime about six or eight months ago, I was unable to make the payment, so went up and told the Judge that and at that time he did give me a suspended sentence of

three years pending the payment of the $3000. My testimony is that I didn't plead guilty to the offense with which I was charged, on advice of counsel, but did it against advice of counsel. I was president of that corporation.

Q I want to call your attention to the testimony you gave yesterday, "Then they thought they could get at it another way, so out of a clear sky one day I was indicted for this theatre tax business, so that the theatre business wound up, and on the advice of my attorney I went up and compromised the thing and plead guilty." Now, which is the right testimony, that which you gave yesterday, or the testimony which you just gave?

A I consulted my own attorney, who talked with Mr. Hatfield and arranged that the plea be made and that the tax be paid, and he advised me to go ahead and do it, and then I talked with Mr. Ed. McKenzie, and went over the entire situation with him and he said I was very foolish to do it. However, I did decide to do it and did it.

The contract between the Brownmoor Oil Company and the Standard Oil Company for the purchase of oil on the Kern River front lease called for oil of a gravity of 14 degrees. The gravity ran between 13.5 and 13.9, but it was easily raised to 14 degrees by a simple method of dehydrating.

The first information I had concerning the Vincent and Stratton purchase of the Brownmoor stock was when Vincent was in Los Angeles at the time the matter came up with Siens, and he had a meeting with Siens and came back and told me that he, Vincent, was going to

(Testimony of Alfred G. Wilkes)

purchase the Cooper and Monrovia stock in the Brownmoor Oil Company. I had nothing to do with the negotiations or transacting any of the negotiations other than simply contacting Siens and Vincent. I made payments on the Brownmoor stock as a matter of convenience to Vincent, for which he reimbursed me.

The Government offered in evidence and the Court received Exhibit 304, which is a letter dated May 16, 1928, addressed to E. B. Siens, from A. G. Wilkes, enclosing checks for $5000 and $2500, stating the $5000 is for the Brownmoor stock purchase advance and the $2500 the one Siens phoned Wilkes about. I don't know why I didn't say anything about paying this money for the benefit of Fred Vincent in the letter. I didn't have anything to do with the transaction itself. Mr. Siens had probably phoned me about the payment that was due and I would take it up with Vincent, and those are probably Vincent's checks which were sent at that time.

Those checks referred to in the letter were probably Vincent's checks. I knew that Vincent and Stratton had an option on all of the Brownmoor stock. They told me they didn't have enough money on hand to take care of the option, and I then talked to Masoni and Perata. I told Masoni and Perata that Vincent had an option on 550,000 shares of Brownmoor stock that called for a payment of over $100,000 and Vincent thought he wasn't going to be able to take care of it all and he wanted to know if I wouldn't go in with him on the purchase of the stock. They finally agreed to go in and I sent for Vincent, and Vincent came into the office and they agreed to go in on the purchase and to pay one-half of the required

money. I think the total purchase price was $132,500, and they agreed to pay half. I never saw them paying any money, and as a matter of fact they never did pay any, though they agreed to do so. I know of no written agreement between Stratton, Vincent, Perata and Masoni relative to this transaction. My testimony was Perata and Masoni told me that they went into deals with Vincent on two or three different occasions, and furnished all the money to purchase the California Refining Company and when the deal wound up, Vincent got all of the stock and they didn't even get their money back. So they stated they didn't want any more dealings with Vincent. They said they didn't want to go in that because they didn't trust him. They wanted me to look after their interest.

Q And you had a verbal agreement with a man they didn't trust and you didn't reduce it to writing?

A I trusted Vincent, and besides that I had the stock in my possession. I had the 420,000 shares of stock in my possession that had been given to me by Siens, so felt that I could protect Perata and Masoni on their deal. I gave Mr. Siens just a receipt for stock. I told Siens that I had to use the stock for security, if he wanted these other people to purchase it. He delivered to me 500,000 shares. The $10,000 was borrowed from Vincent & Company and Shingle, Brown & Company to sew up an option on the Cat Canyon leases, which were taken in Fred Shingle's name, with the understanding that they would eventually go to the Italo Company. I didn't borrow that $10,000 in the name of the Italo Company; I borrowed the money from Vincent and Shingle. I can't say as to whether Vincent and Shingle were planning to

(Testimony of Alfred G. Wilkes)

sell them to the Italo Company at an increased price. They were taking the leases. The Italo wasn't in a position to purchase them and they took the leases in Fred Shingle's name. I didn't say that the plan was that they should take the leases in their name and turn them over to the Italo. That was what I wanted them to do but they were under no obligations to transfer them. After they acquired the leases, they were in a position to deal with the Italo in any way they wanted to. The reason I put up the 80,000 shares of Brownmoor stock as security was because that stock belonged to Vincent and he was the one who put it up.

Q And that stock was not given as collateral security for Vincent's loan of $5,000, is that right?

A I never really considered the stock was given as security for the $10,000 loan. I will admit that the letter indicates that that is what was done.

Q Now, here is a letter, Exhibit No. 141, that you sent to Fred Vincent & Company, to Fred Shingle & Company, and gave a carbon copy to Frederic Vincent & Company, and you also kept a copy yourself, apparently. "Shingle, Brown & Company, Gentlemen: I hand you herewith 80,000 shares of the Brownmoor Oil Company stock in Fred Shingle's name to be held as collateral for $5,000 loaned by Frederic Vincent & Company and $5,000 loaned by Shingle, Brown & Company, to be held for joint account." Now, if this was Frederic Vincent's stock, why did you have Frederic Vincent put up his stock as collateral for his own loan?

A Because Brown wanted some security, and Vincent put it up. I afterwards returned the 420,000 shares of

(Testimony of Alfred G. Wilkes)

Brownmoor stock to Siens. I don't remember whether I got my receipt back from Siens.

The 600,000 units of stock issued by the Italo Petroleum Corporation of America to the Brownmoor Oil Company was delivered to Siens by the company.

Q Now, in Exhibit No. 171 you notified Frederic Vincent & Company that you held those 420,000 shares for them as security, is that right?

A I think that is what I stated in the letter.

Q Now, why was it you gave that stock back to Siens?

A I don't say I gave it back to Siens. I think he came to San Francisco and endorsed the stock and it was then divided up, split up there at the San Francisco office. Mr. Siens instructed me to split the stock up. I can't tell you whether there were any written instructions. I made no investigation to ascertain who the stockholders of the Brownmoor Oil Company were but took their word for who they were. I told Siens that I was going to put 230,000 units of the Italo stock in Fred Shingle's name.

When Stratton testified that the 230,000 units of stock were delivered to him by me at the time that I received the three checks that are in evidence, he testified falsely. I instructed Shingle, Brown & Company to deposit the two checks aggregating $68,842.90 in the David Garvey account until the settlement was made with Perata and Masoni. I know that I did not take the certificates of stock representing those 230,000 units to Vincent & Company's office, and did not deliver it to Stratton, because the receipt is signed by Vincent. He signed Fred Shingle's name to it. I didn't know it was delivered. I would not have delivered it to him. I did not have any writing

(Testimony of Alfred G. Wilkes)

between myself and Frederic Vincent and Company relative to the amount of money that was to go to Masoni and Perata out of this deal. I gave no instructions to Shingle, Brown & Company relative to the transfer of the $25,000 from the David Garvey account to Masoni or Perata.

Q Well, now, if it is shown that there was still some $18,842.90 in the David Garvey account for your benefit, what services did you perform to get that money?

A That remained in that account, but was never settled until after the settlement with Vincent and that was part of the money on the settlement of the 75,000 shares of Italo stock which Vincent was supposed to give me for my services.

Q Well, now, if this $24,750 and this $44,092.90 were for the benefit of Mr. Masoni and Mr. Perata, why were you in a position to effectuate any settlement concerning that which was in the David Garvey account?

A I wasn't.

Q But you just stated that at the time Vincent & Company had the final settlement, that on account of the money they owed you you took this money?

A You want me to tell you exactly about that?

Q Yes, that is what I want to get at.

A When Vincent came to me and showed me this memorandum, I told him I did not know whether Masoni and Perata were going to be satisfied with the statement or not, but I talked to Perata and told him Vincent had made up the statement and that he wanted to buy the stock and according to his statement Perata would have about $25,000 coming, and that the money was over at Shingle

(Testimony of Alfred G. Wilkes)

& Brown's. I don't know that I knew that it was in the David Garvey or the Montgomery Investment Company account, or where it was. Masoni was not satisfied with the settlement. He said that he had gone in to buy the stock with Vincent and was ready to pay his share of the purchase obligations, and wanted his share of the stock. As far as the trade with Shingle, Brown & Company was concerned, for their services, that was all right; I then went to Vincent, and in a couple of days had the matter settled up. Vincent agreed with Masoni that he had something in the neighborhood of 30,000 units coming, and finally settled the matter up by giving Masoni 21,000 units of stock. I borrowed that stock from Siens, and Vincent afterwards gave it to me and I gave it back to Siens. Masoni's interest in the options to purchase the Brownmoor stock was settled by the payment of 21,000 units of stock.

Q Why was it then that out of the David Garvey account Masoni received a credit of $25,000 in the big syndicate?

A I told you I don't know anything about that.

Q You don't know anything about that?

A I didn't keep Shingle-Brown's books.

Q But there was an account by the name of the David Garvey account that you had control of?

A No, I didn't have control of that part of it.

Q You didn't have control of this part of the David Garvey account?

A No, sir.

Q Who did have control of it?

A I suppose Shingle-Brown.

(Testimony of Alfred G. Wilkes)

Q Then any transactions they made relative to the $25,000 were made without your knowledge and consent or without your directions or instructions, is that right?

A That's true. I didn't know anything about it. I did know that Perata took $25,000 as his share of the profits on that deal, and put it in the big syndicate. I didn't hear anything about the $25,000 in the Masoni account until I was in this court room. I never asked for any accounting from Shingle-Brown & Company as to the David Garvey account I was putting my money in. I do not remember any instructions to Mr. Shingle or Mr. Brown or Mr. Jones to draw a $40,000 check against that account for any purpose. I never instructed them to draw a $10,000 check.

The 80,000 shares of Brownmoor stock were placed in the name of Fred Shingle at the request of myself or Vincent.

Q Now, I want to call your attention to the statement that was made by Mr. Westbrook, Exhibit No. 155, please.

MR. MEADER: I understand that Mr. Redwine stipulated that at the time it went into evidence, that that was applicable solely to Mr. Westbrook. Therefore, I think it would be objectionable on cross examination of this witness, anything regarding that statement. It was introduced by stipulation only against the defendant Westbrook.

MR. REDWINE: Well, it was gone into on direct examination of this witness.

THE COURT: It was what?

(Testimony of Alfred G. Wilkes)

MR. REDWINE: Mr. Wood, on the direct examination of this witness, went into this statement.

MR. WOOD: That is correct.

THE COURT: Overruled.

MR. MEADER: Exception.

A The statement in Exhibit 155 that I received $72,000 of the $288,000 paid for the Siens-Shores-Westbrook stock is not true. In the purchase of the Brownmoor Oil Company, it was part of the understanding that Shores, Siens and Westbrook should become directors of the Italo Petroleum Corporation and they thereafter became directors in the company.

Referring to Exhibit 145, dated June 14, 1928, I undoubtedly had a talk with Fred Shingle about June 13, 1928, relative to the 40,000 units of Italo stock that would be delivered to him, and while I do not recall the conversation I undoubtedly told Shingle that Vincent would like to purchase the stock. The 40,000 units of stock referred to in that letter would be the stock that the syndicate was entitled to through the 80,000 shares of Brownmoor stock. That stock was furnished by Frederic Vincent & Company through the stock purchases that they had made.

I had no interest in the money that was to be received from the stock owned by Siens, Shores and Westbrook and sold by them to Vincent. After Siens came into the Italo Company I saw very little of him.

Thereupon Government counsel showed the witness some letters and telegrams and stated that they were from the files of the Italo Petroleum Corporation of America, and the said documents were marked for iden-

(Testimony of Alfred G. Wilkes)

tification, and the court, upon motion of defendants, admonished the jury that the statement by the District Attorney that the documents came from the files of the Italo Petroleum Corporation of America was not any evidence of that fact.

This endorsement on the check dated June 21, 1928, in the amount of $75,000 is in my handwriting, but I do not recall what the check was for.

Thereupon the report of Maurice C. Myers, Trustee, to Fred Shingle, Syndicate Manager, was received in evidence and marked Exhibit 308. Said Exhibit 308 is dated December 6, 1928. As it is impractical to set this report out in full, it will be transmitted to the Circuit Court of Appeals.

If the trustee's report shows that $50,000 of the $75,000 check went to the McKeon Drilling Company and $25,000 went to Edwards on the Edwards property, I presume that is correct.

The check was offered and received in evidence and was marked Exhibit 309, and is a cashier's check dated June 21, 1928, payable to A. G. Wilkes in the amount of $75,000. It bears the endorsements "A. G. Wilkes" and "E. Byron Siens" on the back.

I know nothing about the transactions between Mr. Siens and Mr. Bentley concerning the International Securities Company. When Mr. Bentley testified that I was the one who suggested the name of International Securities Company, I think he was testifying falsely.

(Testimony of Alfred G. Wilkes)

I testified that as a result of some dispute with Frederic Vincent & Company, John McKeon placed some of his stock up in escrow to settle the dispute between Vincent & Company and the Italo Petroleum Corporation of America and the syndicate. Out of that stock 125,000 units were given to Frederic Vincent & Company for what he claimed were his market losses in supporting the market. And some more stock was delivered for the purpose of having Vincent complete the partial payment contracts that he had entered into. All of that stock belonged to John McKeon.

Q Why was it, Mr. Wilkes, that you received some $25,000 that was paid out of that escrow?

A I received considerable sums of money from John McKeon's stock, because by that time I had an arrangement with John McKeon whereby I was devoting all of my time and all of my—paying my expenses towards the organization of this new company of which Mr. McKeon was to be the head. It really was a reorganization of the Italo that we were working on. The name of the McKeon Oil Company was not suggested until considerably later. At that time I still had the title of General Manager of the Italo Company, but I was not the general manager. Robert McKeon had taken charge and Mr. Lacy had become the president, and I was doing very little. I received the money from John McKeon as his agent, and have had an accounting with him for it. The accounting was had at the end of 1929 or the spring of 1930. At that time I accounted to him for the $25,000 that I received. All I know about the $25,000 that Siens received was what Mr. McKeon told me, and

(Testimony of Alfred G. Wilkes)

that was that Siens was looking after his outside interests, paying accounts for him, building a hotel in San Bernardino, and a ranch.

Q Why was it that Fred Shingle & Company received $25,000 out of this money?

A That was an arrangement with Mr. John McKeon. It was understood by that time that Shingle-Brown would get certain shares of John McKeon's personal stock for the work that they had done for the company.

Q Well, now, if you were acting as the agent of Mr. John McKeon, and you were simply receiving the money as his agent, why was it that this was included in income tax statements that were filed by Wilkes and Cavanaugh partnership?

A Because by the end of 1929, the proposed organization, the panic had come on and the proposed reorganization was a hopeless situation, and in the settlement with McKeon he simply said, "Well, you keep what you have spent and account for it in your income tax, what you have given to me, and Siens, I will account for Siens."

I can't tell you from memory whether I received $21,577.60 out of the $86,310.00 mentioned in Exhibit 104, letter dated December 12, 1928, addressed to Shingle Brown & Company, which reads in part as follows:

"Gentlemen: You are hereby authorized and requested to sell and deliver to Frederic Vincent & Company 46,819 units of stock of Italo Petroleum Corporation of America owned by us and held by you at and for the price of $1.60 per unit, and 20,000 shares of preferred stock at the price of 57 cents per share. You will please credit us with the

proceeds and advise us of the receipt thereof. Yours very truly,

McKeon Drilling Company, Inc.,
by John McKeon."

I was the active head of the Italo Petroleum Corporation of America up to a certain point.

With reference to Exhibit 267, that was probably prepared by Doremus & Company and sent out with my knowledge and consent. I don't know that I ever saw that particular letter before it was sent out, but at that time Masoni was very much upset about the Cal-Italo business and he put an ad in the Italian papers warning the stockholders against the Cal-Italo situation, and I think he sent that letter too.

With reference to the letter of March 8, 1929, offered in evidence in support of count 2 of the indictment, I would say that at that time I was paying very little attention to the company, and the chances are I did not see—I mean the actual handling of the company, and I probably did not see that letter before it went out. I do not know that the letter went out from the company.

After October 15th or the 1st of November, when Mr. Lacy and Mr. Robert McKeon came into the company, I paid very little attention to the actual operations of the company. I suppose the president of the company was responsible for the letters that were sent out.

With reference to Exhibit 78, I did not prepare that letter. I undoubtedly gave the facts, but had nothing to do with the financial statement, because I could not make

(Testimony of Alfred G. Wilkes)

a financial statement if I tried, but I saw this letter and I undoubtedly read it before it went out, because my name is signed to it, and I undoubtedly knew it went out.

Exhibit 77 is signed by me. Exhibits 77 and 78 seem to be the same. I knew that was prepared in the interests of or for the benefit of the Italo Petroleum Company of America, and I undoubtedly knew that it was to be sent to the stockholders.

I consulted Mr. Goldstein at the time Exhibit 179 was prepared, and when it was finally completed I was in New York, but at the same time the majority of the information in there was supplied by me, and I have read it since it has been introduced in evidence here, and I would have sent it out if I had been there.

I remember the testimony of Mr. Behr concerning some $30,000 that was supposed to have been paid by me for the purpose of obtaining the permit from the Corporation Commissioner's office to issue the stock of the Italo Petroleum Corporation of America. I have no recollection of receiving this wire dated August 6, 1928, Exhibit 311 for identification, apparently being a copy of a telegram addressed to me and signed Horace J. Brown.

I would not testify whether I did or did not receive $30,000 from Horace J. Brown about August 6, 1928. I have only met Mr. Friedlander once, and that was the time that he wanted to see a copy of the syndicate agreement.

(Testimony of Alfred G. Wilkes)

Thereupon there were received in evidence a carbon copy of a letter dated July 14, 1928, addressed to the State Corporation Department from Maurice C. Myers, together with a letter to A. G. Wilkes and an order dated July 16, 1928, addressed to Italo, attention A. G. Wilkes, and a carbon of a letter dated July 19, 1928, addressed to Maurice C. Myers, which are in substance as follows:

Memorandum of July 14, 1928, addressed to A. G. signed M. C. M. enclosing copy of a letter he desires to file and stating that "Mr. Abel told me this morning that Wolch took charge of the application immediately it was filed. Abel believes that he will pass upon the question of values but is not certain. He can be counted upon for all the help possible." The enclosed letter is addressed to the State Corporation Department from Spalding & Myers relative to the Italo application, and states that "on Monday last we filed the application of Italo Petroleum Corporation of America for permit to sell and issue 12,000,000 shares of its capital stock. Before filing the application we conferred with Mr. W. D. Abel of your department and Mr. Wilkes, vice-president and general manager of the company discussed in detail the proposed program. We followed the suggestions of Mr. Abel and when the application was filed Mr. Abel was fully informed regarding matters of business policies of the company, the proposed new organization and personnel, and in fact all matters which seemed to be important in considering the merits of the application. In view of Mr. Abel's particular familiarity with the affairs of the

(Testimony of Alfred G. Wilkes)

company and with the properties and technical matters involved in this application we were surprised and disappointed to learn this morning that he had not been consulted." The letter urges a conference with Mr. Abel. Also copy of letter dated July 16, 1928 to Italo Petroleum Corporation of America, attention A. G. Wilkes, enclosing a copy of a financial statement filed as an exhibit with the Corporation Department, and a reply to Spalding & Myers dated July 19, 1928, enclosing the certified copy of the financial statement stating that the corporation had not been functioning long enough to give an earning statement, but could give an income statement of properties being acquired.

I didn't know that the Italo Petroleum Corporation of America set up their assets at a valuation of around $20,000.000.

Q. You do know, do you not, that Mr. John McKeon intended to form the McKeon Oil Company with those assets written down on the books to amount to only $10,000,000.00?

A I don't know that I looked at the books. Yes, I knew shortly after it was done.

REDIRECT EXAMINATION

With reference to the contract between the Brownmoor Oil Company and the Standard Oil Company for the purchase of the oil from Section 16, that oil to be of a gravity of 14 degrees, it is a simple matter to raise the gravity, but it was not done in this case, because I had a talk with one of the Standard Oil Company men and he said that the difference of a half a degree of gravity

would not make any difference. I told him that we would raise it if they wanted it raised.

There is nothing in the documents that were shown me on cross-examination by Mr. Redwine that I know of that consists of a direct mis-representation of any fact concerning the Italo Company. There is nothing in them that I would not send out at the present time to the stockholders, knowing the facts as I knew them at that time, and so far as I know they state the true situation relative to the situation of the company. I think that most of the letters and pamphlets and financial statements that were sent out were prepared by Doremus & Company from facts that they received from the Italo Company. At the time we submitted our advertising data to the Doremus Company we felt that they could be relied upon to tell the truth and not misrepresent the facts that were given to them for the purpose of writing them up and subsequently publishing them.

RALPH ARNOLD,

a witness on behalf of the Defendants McKeon, under oath testified as follows:

I am a geologist, having graduated from Stanford University, and after leaving college was employed for six years as a member of the United States Geological Survey, during which time I examined all of the oil fields in California. I made most of the maps that were used in the Government bulletins covering generally the oil fields in California. After that experience with the Government I was engaged in private practice as a geologist, and have been ever since. I was consulting engineer for the United

(Testimony of Ralph Arnold)

States Bureau of Mines up to 1921. As part of my duties as geologist and consulting geologist, I have had considerable experience in appraisal work, and was in charge of the appraisal work of the Internal Revenue Bureau of the United States during the War. That work covered the appraisal of practically all of the oil properties and mining properties in the United States for taxation purposes. I have done appraisal work for British companies. I have become familiar with the value of oil properties and the productivity and life of them.

I am familiar with the area located in Los Angeles County known as Signal Hill, and made the first geological report that was ever published on that field, as a college thesis in 1901. The Signal Hill field is one of the greatest oil fields in the world, because of the great amount of oil that is taken out of a very limited area, and for that reason I would say that it is a very long-lived field, and that the thickness of the formation is greater than in any other field that I know of in the world. The Texas, Oklahoma and Kettleman Hills fields are not in the same class as the Signal Hill field as regards the thickness of the oil formations and productivity.

In the summer of 1928 the conditions in the oil industry were the best that I had ever seen them in my twenty-five years experience. At that time the prosperity of the oil industry was going up all of the time, and I felt that the oil business was on the up trend. That was the general opinion among oil men at that time. In 1929, due to the importation of large quantities of oil from Venezuela and the natural results of the depression late in

that year, there was a very decided effect upon everybody's ability to raise money and conduct any business, particularly the oil business. The result of those conditions has brought about the curtailment of oil.

As I remember it, the percentage of curtailment in the Long Beach field was from 25 to 50 per cent. 40 per cent was the usual curtailment that was practiced. Curtailment was required by the oil purchasing companies as a condition upon which they would purchase the oil. I do not remember the exact price of Signal Hill crude oil in 1928, but it was about as high as at any time I remember the oil business. I think it was around $1.50. Since that time the price has gone down to as low or lower than 35 cents per barrel. The decline in price and the curtailment have had a very depressing effect on the price of oil properties.

If my attention was called to a group of properties which since 1928, under curtailment, had sold their oil at market in spite of those facts, between the fall of 1928 and January 1, 1933, after paying operating expenses had produced net $1,970,000 in money, I would say with reference to the value of those properties in 1928 as the conditions then were, and without any expectation that curtailment or decreased prices in oil would come, that by using the curtailment practice they would be worth, that is, they would have made a profit of over twice as much, and as regards price I should say that the average price there was about half of what we have had on the 1928 prices. That would have given another doubling of the profits. It seems to me they should have given a profit

(Testimony of Ralph Arnold)

then of somewhere between three and four times the profit that they made, if they had sold all of their oil and at prices which were prevailing in 1928.

In determining the value of an oil property, the generally accepted method is to try and find out approximately the amount of oil that is yet left in the ground that is available for recovery, and then to estimate how fast you can get it out and find out the value of it, and then find out the present value based on the years in which the oil will be produced. You will have to apply that factor to bring it up to the present. It is largely a mathematical process and a matter of opinion, based upon the experience of the appraiser. You will never find any two men that will estimate exactly the same amount to be in the ground, and one man's opinion of what the appraised value of the oil will be in the future may differ from another man's. It is the same as in any other business, and it is a matter of experience rather than anything else. It gives you your foundation for being a good or a poor appraiser.

I have known John McKeon for about 25 years, and have observed his operations in the oil business. I consider him one of the best oil production men there is in the world today. I am familiar with his general reputation for truth and veracity and good character and honesty and it is away above the average. He has a reputation that his name is better than his bond, because the bond might depreciate, but I have never known Jack's name nor him to go back on his word. He is always good for whatever he says.

(Testimony of Charles S. Thomas)

CROSS EXAMINATION

I know the geologists, Mr. Thomas and Dr. Starke. It would be a coincidence if two geologists of their standing and of mine made independent appraisals of the same property and were close together. I would say that if Mr. Thompson estimated the value of the McKeon Drilling Company's properties at $9,000,000 and Mr. Thomas at $7,500,000 and Dr. Starke at $5,875,000, being a difference of over $3,000,000 between the highest and lowest figures, that if the appraisals were made about the same time the two extremes there would be rather widespread. The basis we use in giving appraisals is what one man is willing to give and what another man is willing to take. We try to find out the values as far as we can of the actual transfers of property.

CHARLES S. THOMAS,

a defense witness on behalf of the defendants McKeon, testified under oath as follows:

For about ten years I was geologist for the Union Oil Company of California, and since May 1, 1921, I have been a consulting geologist, conducting my own office in the city of Los Angeles. I attended the Colorado School of Mines, University of Michigan, and the Massachusetts Institute of Technology at Boston. I am by profession a geologist and have been engaged in locating, passing on and evaluating oil properties for about 22 years. I did most of the geology work on the property on which the Union Oil Company drilled the Richfield Discovery Well, and geologized Santa Fe Springs for the

(Testimony of Charles S. Thomas)

Union Oil Company, also Dominguez Hill and Signal Hill. About fifty per cent of the work that I have done as a geologist has been appraisal work of oil properties.

Thereupon the witness explained the method of examining, investigating and evaluating oil properties with reference to considering the depth of the well, the thickness of the sand, the character of the sand as to fineness or coarseness, the gravity of the oil contained in them, volume of gas associated with the oil, the manner in which the wells have been brought in, the position of the structure and the position of the particular well with reference to the apex of the structure.

I first met Alfred G. Wilkes after the middle of June, 1928, in Maurice C. Myers office. Myers had phoned me and made an appointment to meet Wilkes in his office. I met Wilkes and he immediately gave me some data concerning a report that he wanted to get out. He told me that he would like to have a report on the McKeon Drilling Company properties at Signal Hill as speedily as I could make it. I made a report on the McKeon properties, which is part of Exhibit 25. The valuation arrived at in this report on the McKeon properties truly and accurately states my opinion as to what those properties were worth at the time the report was made. In making the report I used the customary and usual method of determining valuation that I have in all of my reports. Where I refer in the report to speculative values or speculative present worth, that is to stress the fact that it has a greater speculation than the statements contained with reference to

other wells where more definite information is available. I am familiar with the area known as the Signal Hill field and have been since 1914. There are three major productive sands in that field. In my opinion Signal Hill is a long lived field, and when you consider the volume of oil that has already been produced and will be produced, it must be classed as a very prolific field.

The valuations which I have placed upon the McKeon properties in this report, part of Exhibit 25, represent the fair and reasonable value of those properties as of the time the report was made, which was the summer of 1928, and it was my opinion at that time and it is my opinion yet if the conditions there remain the same. Since that time curtailment has been put into effect, and I believe the Signal Hill curtailment was first 40 per cent in the fall of 1929, and since that time curtailments have proceeded until now the curtailment is, after 40 barrels are taken from the total potential or the full amount that the well will produce, it is then allowed to produce 35 per cent of the remainder. Also the price of oil has been cut, and for the past 60 days the price for crude oil has been about 85 cents a barrel. The prices have fluctuated so often that I would not be able to give you the history of the price fluctuation.

Thereupon the report identified by the witness, part of Exhibit 25, was read into evidence. It consists of a voluminous report with maps, charts and plats, giving the witness's opinion as to the value of the McKeon Drilling Company's properties as of July 2, 1928, together with the reasons therefor and the basis of said valuation, as

(Testimony of Charles S. Thomas)

$7,537,123.00. Also a valuation upon the Pelham properties of $2,970,750.00.

I made reports on quite a few other properties for the Italo Petroleum Corporation of America, and in determining the values of the properties other than the McKeon property I used the same system of calculation and the same methods of arriving at my determination that I used on the McKeon property. This is the same system that I have used for a number of years.

The Kern River Front field in which Section 16 is located has proven itself to be a long-lived field.

DIRECT EXAMINATION

(By Mr. Meader) In July, 1928, I had a conversation with Mr. Maurice C. Myers in his office in Los Angeles. I looked to him for most of the information relative to the history or production records of these properties. In compiling reports it was necessary to get all of the historical data that you can possibly assemble, and Mr. Myers made the statement that they were, that is, that he was perturbed and upset, and I asked him the specific reason for his being upset, and he stated that they were holding up the permit for the issuance of the stock, and that they had promised to have it on different occasions, and each time when the time fell due they put it over to a future date. And I said, "Well, maybe you haven't got any loose change when you go over there." He said, "What do you mean?" I said, "I don't know anything about it, except it is common talk that you have got to have some money when you go over there to get a rush order through, at least, or get something through that you are

interested in. If you are worth anything you have got to pay for it, in other words." His reply was, "I will see the whole outfit in hell before I will give them a dime, and I believe that I voice the sentiments of everybody connected with this concern."

CROSS EXAMINATION

I would say that the worth in anything is the amount of money it will bring. If the seller asks a certain price and the purchaser offers the same price, there is an immediate sale, but if the prices offered are different and a sale is made, it usually depends upon a compromise. In my experience in the oil business, I have done business with a purchaser as well as the seller of oil properties. In making my estimate it would not make any difference as to which one of those I represented. There are many properties located in Signal Hill.

In 1928 there were plenty of purchases of oil lands in the Signal Hill District. The question between the purchaser and the seller was how much do you want and how much will you take? I would not admit that the practical experienced operator knew as much about his property as the experienced engineer or geologist. I have no way of knowing whether or not the McKeons knew more about the McKeon Drilling Company properties in 1928 than I did.

I don't recall whether along in the middle of 1928 there were sales made of properties of the Signal Hill district other than the Graham-Loftus and the McKeon Drilling Company properties. I only know of other sales as hearsay. I don't know whether the price at which an oil

(Testimony of Charles S. Thomas)

property sells is a fair criterion in determining its worth. It would depend on other factors. I would have to know what the property was, how much it sold for. I would have to be acquainted with it. I did say that the worth in anything was whatever money it would bring. It is a fair criterion to base the selling price of one property upon the selling price of another similarly located.

I regard John McKeon as one of the best oil operators in the country.

The date of my report on the McKeon Drilling Company properties is July 2, 1928, valuing those properties at $7,537,123.00. In July, 1928, I made a report on the Graham-Loftus properties, at the request of Mr. Wilkes. Mr. Wilkes paid me for both the reports. I place a valuation on the Graham-Loftus properties of $6,850,750.00 as of July 5, 1928. I do not know the price at which either the McKeon or Graham-Loftus properties were sold to the Italo Petroleum Corporation of America. The fact that the Graham-Loftus properties were sold for $3,000,000 cash and were appraised by me at $6,850,750, and that the McKeon properties were sold for $500,000 cash and $500,000 in notes and $500,000 in the assumption of liabilities, and 4,500,000 shares of the Italo Petroleum Corporation of America capital stock, of a par value of $1.00 per share, and that said property was appraised by me at $7,537,123.00, would not make any difference in my opinion as to the valuation of those properties, and I am still of the opinion that my valuation of both of those properties made at that time is correct. My valuation would be in no way changed by the selling price of the property. At the time that I made the appraisals of

those properties, I must have known what the production was of the various wells. If the Graham-Loftus properties sold for $3,000,00 in the middle of 1928, I would say that that was *certain* a cheap enough price for them, and I think that upon the basis that the sale price for the McKeon properties that you have stated to me that the same is true that the price was cheap enough. The number of barrels of oil per day that the wells are producing is not the determining factor as to the value of the property. You must also consider the condition of the wells, the depth at which they were finished, their age, the time they have been producing, the relative character of the oil, the amount of water or emulsion in the oil, and many other physical properties that must of necessity be taken into consideration in arriving at an intelligent basis upon which to make estimates of probable valuations.

With reference to my employment to appraise these properties, there was nothing contingent about my compensation. It was not contingent upon getting a permit or anything of that sort. Wilkes just asked me to make the report and get it out as speedily as possible.

REDIRECT EXAMINATION

I had no interest whatsoever in the McKeon Drilling Company properties. I was never promised or paid any reward or compensation by any of the McKeons for making the report. The same is true with respect to the Graham-Loftus and the other appraisals that I made. If it was a fact that at the time I made my report the McKeons had six wells in the course of drilling and the Graham-Loftus only two, I took that into consideration in

(Testimony of Dr. Eric A. Starke)

estimating the values of the properties. My valuation is based solely on the oil content of the area, and does not include the value of the equipment, such as derricks, casing and so forth. It is recognized as a constructive oil development program to acquire properties which are producing oil.

RECROSS EXAMINATION

In July, 1928, I would have advised and did advise the payment of $7,537,123.00 for the McKeon properties, and the payment of $6,800,000 some odd thousand dollars for the Graham-Loftus properties. By that I mean that is what I make the valuation at in my report, and I would have advised my client to pay that much money for the property.

DR. ERIC A. STARKE,

a witness on behalf of the defendants McKeon, testified under oath as follows:

I am a graduate of the University of California, and was head of the geological department of the Standard Oil Company of California for some twenty-three years, and thereafter chief geologist for the Union Oil Company of Delaware until it was absorbed by the Shell Company of California. Since that time I have been practicing my profession of geology in this community.

In the year 1928 I was employed by Italo Petroleum Corporation of America through Alfred G. Wilkes to examine a number of properties, including the McKeon Drilling Company's properties at Signal Hill and the property of the Brownmoor Oil Company on the Kern

(Testimony of Dr. Eric A. Starke)

Front field. I had known Mr. Wilkes at the time we were both connected with the Union Oil Company of Delaware.

I made a written report on the Brownmoor Oil Company properties, but prior to making that I did not inform Mr. Wilkes of what the report would be. After the written report was made it was delivered by me to the company. The properties on which I made report are all contained in that book, which is part of Exhibit 25.

The witness thereupon identified certain reports, part of Exhibit 25, as made by him upon the properties of the McKeon Drilling Company, Inc., the Brownmoor Oil Company and other properties.

I have known John McKeon for about fifteen years, and am familiar with his general reputation in the oil business as a production man. His reputation is very high, being the most outstanding one in the State. The report which you have shown me, which was made by me, represents my true opinion as to the value of the McKeon properties. In arriving at the conclusions which I did in that report, I used the method of procedure which I customarily and ordinarily use in appraising oil properties, based upon my experience.

In my opinion the Signal Hill Oil field is a long-lived field. I have never yet known a major field in California to die.

The report in evidence, part of Exhibit 25, which I made upon the properties of the Brownmoor Oil Company truly represents my opinion based upon my experience and my investigation of the value of that property, and

(Testimony of Dr. Eric A. Starke)

in making the same I adopted the method of calculation usually and customarily used by me. This is a report that I made from an examination of the Graham-Loftus property, and is also part of Exhibit 25, and truly and correctly states my opinion as to the value of that property in 1928.

I would advise a client of mine to purchase the McKeon properties on the basis of the valuation which I have placed in that report, if the conditions today were the same as they were in 1928, and I would have done so in 1928.

There has been a decided change in the oil industry since 1928.

Thereupon counsel read into evidence the report of Dr. Starke upon the properties of the McKeon Drilling Company at Signal Hill, and said report is impossible to reproduce in this record because it consists of plats, maps and charts and other drawings, the original of which will be sent to the Circuit Court of Appeals. However, said report places a total present net worth of the said leases of the McKeon Drilling Company at $5,873,818.00.

In making this report I did not take into consideration the physical properties of the McKeon Drilling Company, but only the leases; by the physical properties I mean the derricks and well equipment on the various leases, and such other equipment as may have been there, including tankage.

Thereupon counsel read to the jury the report of Dr. Starke upon the Brownmoor Oil Company properties in the Kern River Front field, which report it is impossible to reproduce in this record because it is quite lengthy and

consists of maps, plats and charts, and contains the opinion and conclusion of the witness that the said Kern River Front lease has a value of $4,225,835.00 as the net worth, and said report is dated May 15, 1928.

In my judgment that was a fair valuation of that property at that time; in fact I think it is a low one.

I did not have any interest in either the McKeon or Brownmoor properties, and was paid a fixed fee, regardless of the results. Since 1928 curtailment has come into effect in the oil industry.

CROSS EXAMINATION

(By Mr. Wood) I have known Mr. Wilkes for about fifteen years and know that his business has been that of financing oil properties. I know nothing about his financial affairs or the method by which he finances these properties. I have always been employed by him as a geologist.

CROSS EXAMINATION

(By Mr. Wharton) The estimates that are included in my report are based on scientific figures, curves, etc., from past experience. As a result of these matters I state in my report that certain things will happen; if they do not happen, I am mistaken. In making appraisals we take into consideration that which we actually know has happened. The balance of it is not a guess, but is based upon knowledge and ability and experience. I have made appraisals of property for the Standard Oil people with only one well on it and estimated that it would produce 100,000,000 barrels, and now the Government claims that we

have produced 125,000,000 already. I have made several guesses or estimates like that, some that were not like that. When I make an appraisal of wildcat territory I always cut it in two. Wildcat territory is property where there are no wells on it or anything; it is just a matter of geology. With respect to a majority of my investigations in wildcat territory, the majority of my predictions have come true, that is, a vast majority.

The same methods and considerations were used and given by me in appraising the McKeon Drilling Company properties, the Brownmoor property known as the Cauley lease, and the Graham-Loftus property. The Graham-Loftus properties belong to Graham and Loftus. Loftus is quite an old oil man, and he told me that they thought I had undervalued their property when I valued it at $7,352,725.00 about the last of June, 1928. They sold it for $3,000,000. They wanted to get out of the oil business, I guess. When I made the report on the McKeon Drilling Company properties on June 20, 1928, I did not consider $5,873,818.00 as an undervaluation. I never discussed that valuation with the McKeon people.

I know Mr. Thomas, the geologist, but do not know whether he was making an investigation of the McKeon properties at the same time I was. I did not confer with anybody in making my appraisal. In getting at the real worth of anything, the test is what it will sell for, but you have to have some basis for negotiating. What an article will sell for depends upon conditions as to how poor the seller is and how willing he is to sell the property, and the value of a salable article depends in a measure upon the

market and the financial condition of the seller, and the sale establishes the value, depending upon conditions.

Q Well, after all is said and done, the real value of anything is just what you can get for it in money, isn't it?

A Well, all owing to conditions. I would say that that is true.

REDIRECT EXAMINATION

I know of numerous oil properties that have sold at a figure not exceeding $100,000 that have produced as high as $10,000,000, and the price at which those properties sold was not the fair measure of their value. In the oil business the speculative element is one of the controlling factors in the purchase and sale of oil properties, and it is the appeal to the cupidity of the buyer that makes persons go into oil purchases. A good illustration is the Cauley lease on the Kern River Front. The Standard Oil bought that for $17.50 an acre, and now it is worth millions. The Cauley lease is right among them.

In appraising oil properties that are the subject of purchase and sale, it is not the custom of experts to find out what other properties have sold for, and they do not consider that at all. It is not taken into consideration, at least I do not take it into consideration and in so far as I know it is not the practice of other appraisers to take it into consideration The more accurate way of determining the value of property is to determine the amount of oil that can be recovered from it.

(Testimony of James V. Westbrook)

RECROSS EXAMINATION

In determining how much oil can be recovered from a property, I would adopt the engineering methods and determine it. There is a difference between speculative investments and other investments.

REDIRECT EXAMINATION

I know of no such thing as an oil investment that is not speculative.

JAMES V. WESTBROOK,

called as a witness in his own behalf, testified under oath in part as follows:

I became a director of Brownmoor Oil Company in June, 1927. About July 26, 1927, Siens, Shores and myself made an agreement by which I was to receive a substantial interest in the Brownmoor*c* Oil Company, provided I performed certain conditions, which I performed. I was in charge of the drilling and production end of the business. I knew nothing about any white stock certificates being issued.

Siens told me in the early part of 1928 that Mr. Wilkes was interested in acquiring the Brownmoor properties for the Italo, but that the Italo didn't want the Baldwin Hills property on which the Brownmoor owed $100,000. I had never heard of Wilkes or the Italo up to that time. I met Wilkes and Masoni in Bakersfield and showed them the Section 16 property. Siens said he thought we could sell or trade the Baldwin Hills property for the 250,000 shares of Brownmoor stock and the $100,000 of Brownmoor notes, both of which were held by the Monrovia Oil Com-

pany. I thought that this stock and the notes would come back to the Brownmoor Company on the trade. Later Siens told me he thought he had made a deal with the Italo for 1,200,000 shares of Italo stock, but the deal wasn't closed yet. I never discussed the Italo deal with Wilkes, but it was handled entirely for the Brownmoor by Siens and Shores, the president and secretary respectively. I was not present at any of the Brownmoor directors' meetings when the Italo deal was made. I signed Exhibit 151, the agreement by which Siens, Shores and myself agreed to sell 480,000 shares of Brownmoor stock to Frederic Vincent & Company for the sum of $288,000. I understood the 480,000 shares would come out of the 500,001 shares in the voting trust, and that I would receive 60,000 units of Italo stock for my share.

With reference to the $30,000 provided for in the agreement, Siens gave me a check for $7,500 and told me that Wilkes had to give some of the money to Vincent & Company in order to finance the sale of the Brownmoor stock to Vincent & Company. I protested but Siens told me that he was trustee for the company, and he could do as he pleased. Siens always paid me for my share of the money.

I also claimed one-third of the 49,000-odd shares over and above the voting trust control. Siens and I had several disputes over this and over the 250,000 Brownmoor shares coming to the Brownmoor from the Monrovia. Siens wanted to have John McKeon act as arbitrator of our dispute, and McKeon agreed with me that Siens had made about 11,600 shares out of the 49,000. I insisted on my share of the 250,000 shares, and after John Mc-

(Testimony of James V. Westbrook)

Keon had agreed to protect me for the 11,600 shares we agreed to leave it to him to settle. Mr. McKeon agreed to give me Italo stock, which was in escrow, and gave me a letter for my protection, which is Exhibit "Q" in evidence, as follows:

(Letterhead Richfield Oil Co.)

November 28, 1928.

"James V. Westbrook,
Los Angeles, California.

Dear Sir:

This is to assure you that there is being held for you in escrow, together with my own stock, 25,000 shares of common and 25,000 shares of preferred stock of the Italo Petroleum Corporation, which I will personally see is delivered to you when the escrow is closed. The exact date can not be determined at this time as this stock is to be held in escrow until certain treasury stock has been sold which I believe will be accomplished not later than February 1, 1929. However I cannot be positive on the date. I will be personally liable for your stock.

Yours very truly,

John McKeon."

In February, 1929, I received 2500 units of no-par Italo stock from Mr. Carpenter. This was the equivalent of 25,000 units of $1.00 par stock. I never knew of Exhibit 107, signed by McKeon Drilling Company, by John McKeon, instructing Shingle, Brown & Company to deliver to me 25,000 units of $1.00 par Italo stock held by Shingle-

Brown in escrow for McKeon Drilling Company. I did not know and had no dealings with Shingle, Brown & Company, and the only Italo stock I received was in settlement of this dispute between Siens and myself.

I received a notice that I had been elected a director of the Italo Company about May 28, 1928, but never attended any board meeting, and had nothing to do with anything transacted at the board meetings. I was never consulted concerning the acquisition by Italo of the McKeon Drilling Company properties, and had nothing whatsoever to do with it. The 2500 units of Italo stock that I received had nothing whatsoever to do with the Italo-McKeon deal, but was given to me for the balance of my interest in the Brownmoor Company by Mr. McKeon at Siens request. I resigned as a director of Italo October 16, 1928.

I received $72,000 in cash and the 2500 units of Italo stock for my interest in the Brownmoor Company.

I made the statement Exhibit 155 in evidence to the officers of the United States Internal Revenue Bureau, and there are certain mistakes in said statement. The stock in the Brownmoor Oil Company was owned by E. Byron Siens, Howard Shores and J. V. Westbrook to the extent of 500,001 shares, which was divided into five parts of 100,000-1/5 shares, and the 200,000 shares were owned by Mrs. Cooper and 250,000 shares by the Monrovia Oil Company, leaving, 49,999 shares owned by Siens, Shores and Westbrook over and above the 500,001 share control. There was a total capitalization of 1,000,000 shares issued and outstanding of Brownmoor stock.

(Testimony of James V. Westbrook)

Further respecting Exhibit 155 the defendant Westbrook testified as follows:

Q Reading further from Exhibit 155: "How much did you get out of this sale of the Brownmoor stock to the Italo?

"A For our control we received $288,000.

"Q Did you, Mr. Shores and Mr. Siens actually receive this $288,000—did you keep it?

"A No, sir, we received $72,000 each.

"Q That $288,000 divided among you three would have made $96,000 each. Why did you not account for $96,000 income, Mr. Westbrook?

"A I received $72,000 for myself.

"Q What became of the other $24,000?

"A In order to accomplish the sale of the Brownmoor Oil Company to the Italo, we gave Mr. Bentley's one-fifth of our control to Mr. A. G. Wilkes, which gave Mr. Wilkes a one-fourth of the $288,000."

What did you mean by that; explain fully.

A Well, as I say, when I was being questioned about that statement there and the way I was questioned, they did not allow me to explain until I would be interrupted.

Q Well, that would not make any difference. All right, you have stated that. Now, you have got an opportunity to tell right here just what you meant by that statement.

A I meant by that, not to accomplish the sale, to finance the sale which actually was, Mr. Siens told me that in order to finance the sale of the Brownmoor stock for Italo stock for Vincent & Company it was necessary to give Mr. Wilkes Mr. Bentley's interest, that Mr.

(Testimony of James V. Westbrook)

Wilkes had to give as commission to somebody. I don't know who it was. Of course, I did not put all of that in it. They did not give me any opportunity.

Q Well, at any rate, that is what you understood and what you meant by that statement, is that it?

A That is all I knew of what Mr. Siens told me.

Q Now, when you mentioned financing, you mean financing the sale of the stock to be received from the Italo to Vincent & Company?

A Well, it was financing the sale of the Brownmoor stock to Vincent & Company which was later converted into Italo stock, as I understand it. I did not know but very little about it.

Q Did you know anything about it except what was told you by Mr. Siens?

A Nothing whatever.

Q Reading further (from Exhibit 155) "Q—Did Mr. Siens and Mr. Shores also give $24,000 of the amount they received to Mr. Wilkes? A—They never gave him $24,000. He was to share and share alike with us four but he couldn't be mentioned, so according to our agreement Mr. Frederick Vincent & Company were to pay Mr. Wilkes $24,000 each out of our $96,000. Q—Where did Mr. Vincent pay this money? A—Mr. Vincent was to pay it to the Merchants National Trust and Savings Bank of Los Angeles and to the credit of Mr. Siens, Shores and Westbrook. Q—Was this actually done? A—No, Mr. Vincent always sent a check to Mr. Siens and Mr. Siens in turn each month gave me my one-fourth. Q—And do you know if he made the same division with the other interested parties? A—It was always understood

(Testimony of James V. Westbrook)

and we talked about it—these payments each month going to the four parties instead of three, because I told the company several times that it was going to show when I filed my income tax returns that I got $96,000, and I only got $72,000, and I think that's the reason that they wouldn't send it to the bank and let the bank make the disbursements."

Now, then, did you ever pay Mr. Wilkes $24,000 or any part of it or any amount or sum whatsoever?

A No, sir.

Q Did you ever see him receive any money whatsoever?

A None whatever.

Q Now, when you say, then, in this statement or report that Mr. Siens and Mr. Shores gave Mr. Wilkes $24,000, that they received or implied that you gave him $24,000, you didn't mean to say that you ever knew of any other circumstances than that which you have related about Mr. Bentley's interest being given to Mr. Wilkes, is that it?

A Well, I suppose it went to Mr. Wilkes. Mr. Siens told me so.

Q I know, but you never saw Mr. Wilkes receive any money?

A I never saw none of them receive any.

Q You never saw anybody receive any part of that money but the money that you received, the $72,000 that you yourself received from Mr. Siens?

A That is absolutely right.

Q Now, you state further with reference to this matter as follows: "Then in your opinion the reason the

(Testimony of James V. Westbrook)

disbursement was not made through the bank was to avoid the record that would be in the bank of the entire transaction? A—Yes, that is my opinion." Did you have the opinion that you were covering up an income tax return, or what was the opinion there about?

A No, sir. I meant that Mr. Siens told me that we had to give it to Mr. Wilkes, and that Mr. Wilkes had to give it as a commission, so why would Mr. Wilkes be mentioned in it?

Q Well, you state further: "It was a part of the plan that Al Wilkes' participation in the split would be covered up? A—I don't know that it was to be covered up in any way."

A I knew nothing about it.

Q "Q—But at least his name did not appear on any of the records? A—No, sir. Q—Are you positive, Mr. Westbrook, that Al G. Wilkes got $72,000 out of this division? A—Yes, sir." Did you ever answer that that way?

A I believe I did.

Q Now, just explain how you are positive Mr. Wilkes got $72,000 out of that transaction.

A Because I actually believe Mr. Siens gave it to him as he told me he did because he had to give it to somebody else as a commission.

Q But I mean you did not see the transaction?

A I knew nothing of it, no, sir.

Q You knew nothing of it except the information given you by Mr. Siens as to Mr. Wilkes?

A That is right.

(Testimony of James V. Westbrook)

Q So all you know about that is pure hearsay and what Mr. Siens told you about that, is that right?

A That is all it was. Just what Mr. Siens told me; I never saw any of the papers.

Q Or did you see or know about any of the dealings that Siens or Wilkes or anybody had with Vincent & Company as far as their relations or dealings with Vincent & Company, did you have anything to do with them?

A I never did, other than signing that agreement.

Q Outside of that, did you have any relationship whatsoever or any dealings that might have been had with Vincent & Company or anybody else in connection with the Brownmoor stock or the Italo stock?

A I never did. I never met the Vincent people until, I think it was, 1931.

Q Now, you say, "Q—Do you know what reason Mr. Wilkes had, if any, for not wanting to appear openly in this transaction? A—No." Well, if you didn't know any reason Mr. Wilkes had for not wanting to appear openly in the transaction, what reason did you have for saying that he could not be mentioned in the transaction? Just explain that.

A Well, if Mr. Siens was giving him the money that had to go to somebody else for a commission, why, I would not know whether he had any reason for not wanting to be mentioned in it or not. I never had talked to Mr. Wilkes about it. All I ever talked to was Mr. Siens. And I said a lot of things in that statement then that I did not have records of, it was hearsay, from Mr. Siens, and I was under oath, and I did not know what it meant

(Testimony of James V. Westbrook)

to be under that, I am not saying that I do not know what it means to be under oath now.

Q. Now, Mr. Westbrook, you have already stated that this information you received, whatever it was, from Mr. Siens, was at the time you made this contract to sell the 60,000 units, your 60,000 units together with the other trust stock, to Vincent & Company for $288,000, and is that the agreement to which you refer when you say Mr. Vincent was to pay this $288,000 to Shores, Siens and myself? That is the agreement you referred to?

A That is the agreement I referred to.

MR. WOOD: If the Court please, I desire at this time to move to strike out from the record all evidence given by this witness in regard to wherein he testified that Mr. Siens told him that Mr. Wilkes was going to do certain things. The testimony of this witness pertains to the document in question, his affidavit, and the ruling has heretofore been made that as to that affidavit it is binding only upon this witness. And if the motion is denied, then in the alternative I will ask the court or move the court to instruct the jury to consider such statements as the witness is now making or volunteering to make relevant to any explanation concerning that document or its evidence only against him and not against any other defendant in this case.

THE COURT: Well, I was wondering about that as the examination proceeded. The original interview has heretofore been read, has it not, Mr. Redwine?

MR. REDWINE: Yes, your Honor.

THE COURT: And it was admitted as against this Mr. Westbrook only?

(Testimony of James V. Westbrook)

MR. REDWINE: Yes, your Honor.

THE COURT: Which was on the theory that it took place after the conspiracy had ceased. Now, on cross-examination certain excerpts are read from it, but the witness is questioned a great deal at length as to matters which do not appear in the interview.

MR. REDWINE: We resist any motion to strike any of the testimony of this witness relative to any conversation between himself and Mr. Siens concerning Mr. Wilkes. We think that the conversations are binding on Mr. Wilkes and binding on Mr. Siens. For this reason, when this document was introduced in evidence, it was hearsay as to all of the defendants except Westbrook, because it was a statement made by Westbrook after the conspiracy had ceased. Now, we have the testimony of Mr. Westbrook given on a conversation between himself and Mr. Siens during the period of time that we claim the conspiracy was in existence. That is not hearsay. That is testimony given from the witness-chair by a witness under oath and is binding on all of the defendants.

(Discussion between Court and counsel omitted.)

THE COURT: I am of the opinion that the evidence given by the witness now, being other than that contained in the statement, is admissible as against the parties affected by it.

MR. WOOD: Exception.

THE COURT: Which is Mr. Siens.

MR. WEST: Would your Honor at this time direct the jury to disregard this evidence as against any other defendants except Mr. Westbrook and Mr. Siens, who

(Testimony of James V. Westbrook)

had the conversation? Of course, the others would not be bound by that.

MR. REDWINE: I object to any such instruction being given, your Honor, because I don't think it is the law.

THE COURT: I think that that would be true. It would fall within the general rule or ruling, rather, that the conspiracy having been established, if the jury so finds that it has been established, then, of course, it is of importance and it does affect all who were members of the conspiracy at that time. Overruled.

MR. WEST: My suggestion, your Honor, was hardly to go as far as that. My suggestion was this: that unless the jury was satisfied a conspiracy had existed or did exist at the time of this conversation, that the evidence would then be limited as against Mr. Westbrook and Mr. Siens. It is a question for the jury to decide whether a conspiracy ever existed.

THE COURT: That goes back to the question as to whether a conspiracy has been proved. That is a matter for the jury to pass upon, naturally. I don't see any way to determine it at this time. The Court cannot know what conclusion the jury may reach from the evidence.

MR. WEST: Well, I don't want to press the matter too much, but throughout the trial there has been a suggestion from time to time by your Honor that conversations are only binding upon those who participate in them, and I would suggest that that rule be followed in the present instance.

(Testimony of James V. Westbrook)

THE COURT: While conversations are binding only upon those participating in them, but suppose that there has been evidence from which the jury might find that a conspiracy existed or a plan to defaud existed, then such conversations, such statements, would relate not merely to the one who said the words, but to all of these defendants. That is the rule.

MR. WEST: It would not be limited, though, your Honor.

THE COURT: No.

MR. WEST: To the conversations that were made in pursuance of the scheme or conspiracy.

THE COURT: Well, I assume, of course, that that would be the case, but you cannot very well distinguish between those made in pursuance of the design and those made that are corroborated by it or that show evidence of it. I don't think that could be distinguished.

MR. WEST: Of something that did not exist, your Honor.

THE COURT: Did you make your motion?

MR. WEST: I move that it be confined or binding only upon the defendant Westbrook and the defendant Siens, your Honor.

THE COURT: Motion denied.

MR. WEST: Exception.

A I did not know of and never discussed the McKeon deal with anyone, and was not present at the meeting of the board of directors at which time it was approved, and never voted for it. I never conspired or schemed to sell the Brownmoor assets to the Italo Petroleum Corporation for the secret profit of any officer or

agent of the Italo Petroleum Corporation, and never had any knowledge of any such scheme or conspiracy, if any one existed.

CROSS EXAMINATION

(By Mr. West) At the time Wilkes and Masoni came down to the Brownmoor property I had no discussion with either of them with reference to the purchase of that property, and so far as I know Masoni had nothing to do with the negotiations leading up to the purchase of the Brownmoor stock.

CROSS EXAMINATION

(By Mr. Abrahams) At the time I was elected an Italo director in May, 1928, I did not know John M. Perata; I had met Paul Masoni twice, Wilkes three or four times; I knew Mr. F. V. Gordon and R. S. McKeon. I never discussed the Brownmoor transaction with Mr. Perata and never met him until we were indicted. I never discussed the transaction with Mr. Gordon or Mr. R. S. McKeon, and knew nothing whatsoever about the Brownmoor deal and never discussed it with any of the directors of the Italo Company. I never discussed the McKeon deal with any of the directors of the Italo Petroleum Corporation of America, neither did I discuss it with any of the McKeons; I knew nothing of the deal and never voted for it and never heard it discussed. Mr. John McKeon agreed to give me that 25,000 units of stock at the request of E. Byron Siens.

(Testimony of James V. Westbrook)

CROSS EXAMINATION

(By Mr. Redwine) Until I came into court I thought there was 1,000,000 shares of Brownmoor stock outstanding.

Prior to the sale of the Brownmoor assets to the Italo, the Inglewood lease was transfered back to the Monrovia Oil Company and the Monrovia Oil Company in consideration of the Brownmoor Oil Company transferring their Inglewood lease turned over the 250,000 shares of the Brownmoor stock and the $100,000 note that they held of the Brownmoor Oil Company. I don't know whether or not those 250,000 shares of Brownmoor stock and the $100,000 note was placed in the name of E. M. Brown.

At the time I was talking of having the settlement discussion with Mr. Siens, he informed me that this stock was sold to E. M. Brown. I didn't ask him who received the money for the stock that was sold to E. M. Brown. It was my understanding at that time that the stock was really the property of Brownmoor. I was a stockholder of the Brownmoor Oil Company at that time and had been a director and Mrs. Cooper had been a stockholder of the Brownmoor Oil Company. I never asked what Mrs. Cooper was going to get out of this 250,000 shares of stock that was sold to E. M. Brown. I was interested in knowing what I was going to get out of

that stock. I wanted my part of it. If it was reduced, I wanted *ot*.

In my discussion with Mr. Shores and Mr. Siens relative to the stock that was to be given to the Brownmoor Oil Company by the Italo Company for its assets, it was stated relative to the amount of the Italo stock that I should receive that when the agreement was made with Vincent and Company I was to receive $96,000 for my interest in the trust. It was later told to me by Mr. Siens that one-fourth of Mr. Bentley's, which I presumed that Mr. Siens, Mr. Shores and I owned, went to Mr. Wilkes, which Mr. Wilkes gave as a commission to somebody.

Mr. Siens told me he was giving Mr. Bentley's one-fifth interest to Mr. Wilkes and I protested it and he explained to me that was the only way that it could be done and finance the sale of the stock to Vincent & Company. He said that Mr. Wilkes had to give it as a commission. He didn't say whom Mr. Wilkes had to give it to.

As far as I knew, the voting trust between Shores and Siens and myself was never terminated. I was never asked for my certificate in it, so I never knew anything about it. I still have my trust certificate. Nobody ever asked me to terminate the trust. I never consulted with anyone relative to the termination of the trust.

(Testimony of James V. Westbrook)

Relative to Exhibit 147, which is a letter dated May 3, 1928, addressed to the Merchants National Trust & Savings Bank and signed E. Byron Siens, President, and Howard Shores, Secretary, it reads: "Attention Mr. Gay, Trust Department, Gentlemen: This will be your authority to transfer 80,000 shares of stock from E. Byron Siens' certificate of 500,001 shares. In reissuing the 420,001 shares, please leave the word 'Trustee' out, as a trust agreement was not entered into. Yours very truly, Brownmoor Oil Company." I don't know whether or not at that time the trust agreement had been entered into. I never knew anything about the transfer of the 80,000 shares of this stock in the name of Fred Shingle.

I told John McKeon that I had some stock coming from Mr. Siens on the Monrovia stock that was coming back into the treasury, or words to that effect. I believe that he called Siens or that Siens called him and they had a discussion. Then he called in Miss Wideman and gave me that letter, which is Exhibit Q. I am not sure whether Mr. Siens told me that the Monorvia stock did not go back into the Treasury.

On cross-examination by Government counsel it appeared that on December 13, 1927, as shown by Exhibit 147, the board of directors of the Brownmoor Oil Company passed a resolution authorizing the increase in the capital stock of the said corporation from $1,000,000, divided into 1,000,000 shares of $1.00 par value each, to $2,000,000 divided into 2,000,000 shares of $1.00 par value each.

(Testimony of Paul Masoni)

PAUL MASONI,

called as a witness in his own behalf, testified under oath as follows:

I became a stockholder in the Italo American Corporation in 1924, and became a director, and resigned, and held a permit to sell stock in the corporation. I later became a director of the corporation, and thereupon ceased selling stock. During the time that I was a director of either the Italo American or the Italo Petroleum I never sold any stock to the public. I bought stock in the Italo American and the Italo Petroleum Corporation from 1924 up to April, 1929. I also loaned or advanced money to the company to pay its necessary expenses.

These checks aggregating $42,750.00 signed by me, and payable to the Italo American Corporation or the Italo Petroleum Corporation were for the purchase of stock or for small advances to the company, or for the purchase of rights in the Italo Petroleum Corporation of America, during the period of time I have referred to. I also loaned about $32,000 to the company, and gave about $8020 to Frederic Vincent & Company to purchase stock of the California Refining Company. My $8020 was repaid to me by Frederic Vincent. The $32,000 I loaned the company was paid back. I advanced other sums of money for the benefit of the company, some of which I was never repaid.

At the time I came down to Long Beach in behalf of the Italo American to take charge of its properties, John M. Perata was president of the company and E. P.

(Testimony of Paul Masoni)

Zanetti had been vice-president and general manager of the company. Zanetti wanted to start a new company known as the Italo American Oil Company of Nevada, and due to certain investigations made, which were reported to Perata by me, Perata made me vice-president and general manager of the company and sent me to Los Angeles to discharge the other men and take charge of the company. I discharged Zanetti, Bassett, and a man by the name of Meyers, who is not the defendant Myers in this case. That Zanetti is the same one who lodged the complaint in the Corporation Department against the issuance of the big permit. I was secretary for the Italo American Petroleum Corporation for a considerable time, and was also secretary for the Italo Petroleum Corporation of America for some time. I had never had any previous experience as secretary of a corporation. I did not prepare the minutes of the various meetings that were held. I could not do it if I wanted to, because of my imperfect knowledge of English.

When Courtney L. Moore, who was a director of the Italo American Company, became a director thereof, he used to attend the meetings of the directors and take the minutes down and take care of that. He never used to bring the minute book to the company office himself but kept them in his own office, and from time to time he called me to the office and told me to sign the minutes, which I would do. I signed minutes of various meetings all at the same time. I have no personal knowledge today of any particular matters that were brought up at any particular meeting of the board. While Italo Petroleum Corporation of America's offices were in San Francisco,

(Testimony of Paul Masoni)

the minutes were kept by Melvin or Sullivan, the attorneys for the company, and afterwards McLachlin was made assistant secretary of the company and he used to take the minutes down and from then on he kept the minute book of the corporation.

During the time that I was secretary of the corporation I relied upon the attorneys for the company to keep its minutes. The accounts of the Italo American were frequently audited. I do not understand bookkeeping, but the books of the Italo American were kept by an accounting firm by the name of Roberts & Noel, who practically had control of the bookkeeping system of the company.

Up to the time of the formation of the Italo Petroleum Corporation we had no appraisal of the property. Mr. Wilkes joined the company in the fall of 1927. He thereupon made an examination of the affairs of the Italo American Corporation, and Perata as president and myself as secretary gave him every facility to make his examination. About that time we were looking for an expert oil man, and after Mr. Wilkes came into the company things moved so fast that it was all like a nightmare to us, so far as the company was concerned. I never had anything to do with the negotiations for the acquisition of any property by the Italo American Corporation. Mr. Wilkes asked Mr. Perata and myself to come down and look at some property, and I came down with Wilkes and saw the property up in the Kern River Front and the Brownmoor Company and their refinery at Long Beach, and I was very enthusiastic about the Kern River Front property. I did not like the refinery at Long Beach because we already had a refinery there,

(Testimony of Paul Masoni)

and we called it a piece of junk. The other refinery looked to me the same as that one. I did not discuss the price of the Kern River Front property, but I was very much enthused over it. Wilkes said he wanted to show me some property down here that might be taken into the company. He never discussed the price or how they were going to make the deal. We had full confidence in him, and, like they say in France, we gave him carte blanche to go ahead if he thought it was all right to go ahead and make the deal. I never negotiated for any of the deals that were put over; that matter was left entirely to Mr. Wilkes. So far as I know, the entire negotiations for the purchase of all of these various properties was conducted by Mr. Wilkes and consummated by him. In fact, some of the property was practically bought even before he even presented it to the board of directors or before we ever heard of it. In the consummation of any of these deals there was no agreement between Wilkes or Perata or De Maria or any of the other defendants and myself that at any time under any circumstances I was to receive any of the commissions or benefits whatsoever personally from these transactions. There was never any such understanding at any time.

I first subscribed to the $80,000 syndicate with $10,000. Wilkes suggested that I subscribe to the syndicate and reduce my subscription from $10,000 to $5000. I believe Shingle-Brown and DeMaria and practically everyone that was interested in the syndicate made the suggestion also.

(Testimony of Paul Masoni)

I notice in the syndicate agreement that I subscribed for $10,000, which is scratched out, and then I subscribed for $5000 for myself and $5000 for Adam Bianchi. As a result of going into the $80,000 syndicate I received $5000 plus interest and 2500 units of stock. I was subsequently paid the $5000 by Adam Bianchi, after the deal had practically been closed.

In connection with the Brownmoor deal, Perata and myself guaranteed Vincent & Company in the purchase of stock of the Brownmoor Company. I did not deal directly with Vincent. I had had quite a few difficulties with Vincent and lost all my confidence in him. Mr. Wilkes came to me and asked me if I would not guarantee the purchase of Brownmoor stock, that it would require approximately from $130,000 to $160,000, and I said, "Who is going to be interested in the purchase of that stock there?" and he said, "Frederic Vincent, and I am asking John M. Perata if he wants to come in." I said, "I won't have anything to do with Frederic Vincent & Company." He said, "Why?" I said, "Because I have had experience with Frederic Vincent & Company." I gave him at one time 40,000 shares of Italo stock which I got no return for it. I gave him money, I advanced money to purchase stock of the California Refining Company, and I was lucky to get just what I put in, for he made lots of money. I asked him for a statement but never got it, so I refused to go in with Mr. Vincent, but the same day or the day after I talked with Mr. Perata, and Perata told me that he was willing to go with Vincent & Company in the venture of the Brownmoor stock. Wilkes called me into his office and asked me again if I

(Testimony of Paul Masoni)

wanted to guarantee the account. I said to Mr. Wilkes, in whom I had a world of confidence, "If you will guarantee me the account and you take personal charge, as far as I am concerned I will be willing to guarantee the account, but if I have anything to do direct with Mr. Vincent I won't do it at all." He said, "Well, leave it to me and everything will be all right." That was the end of it. I derived 21,000 units of Italo Petroleum stock in guaranteeing the Vincent purchase of the Brownmoor stock.

Referring to Exhibit 299, line 8, I never received the $25,000 thereon listed. That $25,000 was never credited on my subscription to the big syndicate. I never heard of the Montgomery Investment Com*a*pny until this trial; I never had any account with that company. I know nothing about the pencil notation, "Masoni" and "Perata" on Exhibit 227. I never received that $25,000 in cash or in any other manner whatsoever. I had been buying and selling a good deal of stock through Shingle, Brown & Company. I had subscribed $100,000 to what is known as the big syndicate, and on July 20, 1928, I had a credit to my account of over $18,000 with Shingle, Brown & Company, and was called upon to make my first payment on the big syndicate. This payment amounted to $25,000, and I gave Shingle, Brown & Company a check for $7000, to Mr. Shingle, and told him to take $18,000 out of my account and apply it to the big syndicate, which they did. This is the $7000 check which I gave to him, dated July 19, 1928, which is Defendant's Exhibit Z. That was the $18,000 credit I had made my first payment to the big syndicate. Out of the $100,000 that I

subscribed to and paid to the big syndicate, I received 51 per cent, so that I lost practically $49,000 on the transaction.

About 18, 1929, I resigned as secretary of the Italo Petroleum Company. I remained a director of the company up until sometime in May, 1930, when I resigned. I resigned as secretary because the job was too big for me and I should never have been secretary to start with.

Sometime in April, 1929, I received 62,500 units of Italo Petroleum stock from Mr. McKeon. Prior to receiving that stock I had no understanding, agreement or promise from any of my co-defendants that I was ever to receive anything in the way of a contribution from Mr. McKeon or otherwise in connection with the purchase by Italo Petroleum Corporation of America of the McKeon Drilling Company. In the early part of 1929 I was down here and I met Mr. John McKeon at the Biltmore. He told me he was going to make a great big company, and wanted to make it one of the biggest companies in the State of California; that he needed the help of all the Italian people, that I had contributed for the company, and although I might not be qualified to be secretary of the company, I could do the company a whole lot of good by sticking with the company and keep on doing the work that I had done in the past. He said, "I am going to give you a block of my stock." He never said how much; he never said when. That was in the early part of 1929, and that is the first intimation I had that he was ever going to give me anything at all. Previous to that time I had never discussed such a thing with any of my co-defendants and had never heard

(Testimony of Paul Masoni)

of it. After I went back to San Francisco, A. G. Wilkes called me into the office and told me about the same thing as Mr. McKeon had told me, that I was going to get a block of stock from John McKeon. About a month or so afterwards, I received a letter from the McKeons to go over and see Mr. Fred Shingle, that he had something for me. I went over to Shingle-Brown and they told me they had 62,000 units of Italo stock that was coming from Mr. John McKeon for my benefit. They presented me with a letter and told me to sign it to show that they had given the stock to me. I signed the letter and got the stock. The letter is the receipt which has been received in evidence. During the time that I was secretary for the Italo-American and the Italo Petroleum, I never dictated any of the correspondence going out from either of those companies. I would not be able to do it if I wanted to do it. The mere fact that my initials "P. M." were sometimes placed at the corners of these letters and documents that went out is no indication that I dictated them. I did not dictate them. From time to time they would come in with a document of some kind and they would tell me to sign it. I never even read it. I took it for granted that whatever the attorney or the members of the company were doing was for the welfare of the company, and they would bring in a document to sign and I would sign it. I did not even file it in my office. I never had a file because I did not have any correspondence with anybody during the time I was with the company. I do not know how to keep a correspondence file.

(Testimony of Paul Masoni)

Referring to Exhibit 268, to the initials printed at the bottom of that letter, "P. M." and "E. M." I did not dictate that letter. I never had anything to do with that letter. Perhaps the first time I saw it was through the mails as a stockholder myself. In many instances I received letters through the mail addressed to myself as a stockholder. I had nothing to do with the translation of this circular from the English language into the Italian language. Prof. Andreani did practically all the translating from English into Italian. I never mailed and never gave any orders to mail the circular, Exhibit 268, referred to in the second count of the indictment, to Grace E. Dennison, 256 Thorne Street, Los Angeles, California, or any similar circular. I never had anything to do with it. I never dictated Exhibit 267, on which my name appears as secretary and treasurer, or any of the other letters. I never translated any of these letters into the Italian language, as appears on the back thereof. I had nothing to do with the letter set forth in the fifth count of the indictment, which is a notice of annual meeting of stockholders, signed by R. S. McKeon as secretary of the company. I received such a notice in Europe. I had nothing to do with the mailing of that circular to Lavine Hill Hopkins, 128 North Sierra Bonita Avenue, Pasadena.

Referring to another circular dated March 8, 1929, addressed to the stockholders of the Italo Petroleum Corporation, I did not have anything to do with the sending out of that circular, and never mailed or caused to be mailed that circular to Mary E. Hill and Lavina Hill Hopkins. The same is true with reference to the re-

maining indictment letters. I had nothing to do with the preparation of this circular, being a report of the directors of the Italo Petroleum Corporation from October 31, 1928, to July 31, 1929, and never sent any of them out.

CROSS EXAMINATION

(By Mr. Abrahams:) I never had any discussion with Raleigh McKeon or John McKeon or Robert McKeon in respect to the acquisition by the Italo Corporation of the McKeon properties. Those men never at any time asked me directly or indirectly to vote for or approve or acquiesce in the purchase of the McKeon Drilling Company property by the Italo, and none of them promised me any reward in the event the properties were purchased by the Italo. When this purchase was made and I voted for it, I exercised my free judgment as to the advisability of acquiring the properties, and I was never dominated or controlled or forced into any such acquiescence by the act of any other person.

With reference to the various indictment letters to which counsel has directed my attention, I do not know whether any of the defendants mailed any of those letters. I do not know whether any of the defendants authorized the mailing of them. There was never any agreement between me and any of the other defendants that any of those letters should be mailed. There was never any discussion between me and any of the defendants that any of us would endeavor to get money wrongfully from any other person. It was my judgment and opinion at the time the Italo Petroleum Corporation of America was

being organized and its business being brought forward by the various steps, through the organization of the syndicate and the acquiring of these various properties, and the development thereof, that it was a sound business and that the company was and would be a success. I did what I did in good faith, believing in the soundness of the company and its condition.

CROSS EXAMINATION

(By Mr. Wood) On the occasion when Wilkes and I visited the Kern River Front property, we remained there about an hour and a half. There was no discussion about the price of this property between Wilkes and myself or between Wilkes and Westbrook or myself and Westbrook in my presence. After we returned to San Francisco, Wilkes discussed the possibility of getting a lot of production out of that property and making a real company out of it. Westbrook said something about the possibilities of the section producing oil. I was and am of the opinion that the Section 16 property on the Kern Front is a good property.

CROSS EXAMINATION

(By Mr. Redwine) I first talked to Mr. Wilkes concerning the purchase or helping to finance the purchase of the Brownmoor stock by Frederic Vincent & Company in the early part of 1928 before the Italo Petroleum Corporation entered into the contract to buy the Brownmoor assets. The contract for the Brownmoor was negotiated between Mr. Wilkes and the Brownmoor people at the

(Testimony of Paul Masoni)

time he told me there was a chance to buy the Brownmoor stock. I would not say exactly as to the date of my conversation with Mr. Wilkes, but I would say it was before the contract was presented to the company. At that conversation only Wilkes and I were present, and Wilkes said Vincent was taking an option to buy Brownmoor stock. He said, "Are you willing to go in and help Vincent finance the purchase of that Brownmoor stock?" I told Wilkes I would have nothing to do with Frederic Vincent. Wilkes did not tell me how much Brownmoor stock Vincent was going to purchase. He told me that Vincent was going to pay in the neighborhood of a hundred thirty-five or a hundred forty-five or a hundred and fifty thousand dollars for the Brownmoor stock. Wilkes said I would have to guarantee one-fourth of that amount. He told me he was going to talk to John M. Perata and tell him to go in on it. He did not tell me how much I would make out of the deal, but I expected to make profits. I never invested any money that I did not expect to make profit. Wilkes said it was a good buy, and he was buying that stock cheap enough that we were going to make some money out of it. By "we" I suppose he meant himself and whoever else was going to go in to guarantee that purchase of that stock by Frederic Vincent & Company. Wilkes told me he was going to be interested with Frederic Vincent & Company in buying that stock, and that is why he asked me if I wanted to be interested with Vincent and himself. I never had any conversation with Mr. Vincent about that deal, and never talked to him since he cheated me out of a lot of stock in the California Refining Company.

(Testimony of Paul Masoni)

After my conversation with Wilkes I had a conversation with Perata, in which he said he thought from the way Wilkes had talked to him that it was a good thing and was a good deal, and if I was going in he would go in too. I had been very close to Perata all the time, and I said to him, "If you do go in, I might take a flying chance on this matter. I would not do it otherwise."

Wilkes called me back to the office and asked me again if I was willing to go into the deal, and I told Wilkes I would have nothing to do with Mr. Vincent, but if he himself would guarantee me that he was going to take care of that transaction, that I was willing to go and guarantee the account. My word has always been good and I didn't have to go any place to guarantee my account. I never signed any papers of any kind. I have done thousands of dollars of business without signing any papers. There was no written agreement with Mr. Wilkes concerning the transaction or concerning how much I would receive on account of my oral guarantee. I left the matter entirely up to Wilkes to see that I got a square deal. There is no written document to show what the transaction between Wilkes and myself was. After my oral agreement with Wilkes I received stock from Wilkes on account of my oral promise to guarantee. At the time he delivered the stock to me, I had a long, animated conversation with him. I stated that I wanted Frederic Vincent & Company to give us a statement of what he had made on that deal. He said Frederic Vincent & Company had sold a lot of stock, had oversold his issue, and that he wanted to purchase and wanted to

(Testimony of Paul Masoni)

keep all the stock. I told Wilkes I was not in favor of receiving any money, but if there was anything coming to me I wanted it in stock. I then asked for a statement which they failed to produce. They said, "You get about 21,000 units of stock or you can receive, if you want, $25,000 in cash. We will buy that stock there at $1.16, or 20 cents a unit, whatever it was; it amounted to close to $25,000. I refused to take the money and I demanded my stock, which Wilkes delivered to me. I received 21,000 units of stock because of my oral promise to Wilkes to advance money for the purchase of the Brownmoor stock, and I made that promise before I found the corporation had a form of agreement to buy the Brownmoor Company property. I did not have a conversation with Messrs. Miles and Fahey, post office inspectors, on November 15, 1931, in which I told them that the 21,000 units of stock that I received from Wilkes was a repayment of various loans that I had made to Wilkes. If I did make such a statement I was not under oath and I was not under any obligation to make any statement to Mr. Miles or Mr. Fahey. I may have or may not have made that statement to Fahey and Miles, but I can't recollect what statement I made to those gentlemen. I will not deny that I made such a statement. I did not have anything to do with the preparation or mailing of the letter dated March 8, 1929, and the letter was mailed without my knowledge or consent. That letter is Exhibit 269 in evidence.

I did not send this telegram, Exhibit 315 for identification, and never had a telephone conversation with Miss Muzzi concerning the letter of March 8, 1929, about

the time it was sent out, and never had any telephone conversation with or concerning any of the letters that were sent out. I did not tell Fahey and Miles about November 5, 1931, that Miss Muzzi had called me on the telephone and told me that there were to be some changes in the letter of March 8th, which was proposed to be sent to the stockholders. I do not remember having any such conversation with the post office inspectors. They were asking me many questions, and I do not remember what the conversation was. I might have told them that I didn't send the telegram, because I am positive I didn't. I might have said to them that Miss Muzzi had telephoned me about that telegram and stated to me that some changes were going to be made; I would have no means of recalling, if I told the post office inspectors that, whether it was true or not. I have no recollection whatsoever of any conversation with Miss Muzzi concerning that telegram, and I would not deny that I had such a conversation. I did not know of this letter prior to the time it was mailed out. I don't think I talked to Miss Muzzi about it before it was mailed. If I did talk to her, I must have done it with the consent of the attorney and people that were above me. I never did mail the letter or send it out. If they would bring the letter to me to sign it, I would sign it. I knew that Frederic Vincent & Company were making up circulars and sending them out, and that after Doremus & Company came in they sent them out. I was never consulted about sending them out. I have never seen this document with pencil notations on it and did not dictate it to anybody. I couldn't have dictated it if I wanted to. I couldn't

(Testimony of Paul Masoni)

dictate a letter in English and I have an awful hard time to dictate one in Italian.

I believe I knew that Exhibit 49, a notice of stockholders' meeting, with a proxy, was going to be sent out through the mails, and that I was named in the proxy as one of the attorneys-in-fact for the stockholders to vote their stock. I was around the office of the Italo Petroleum Corporation very much of the time. I did not know of the different literature that was sent out through that office. My duties around the office of the Italo Petroleum Corporation consisted of me starting to sign certificates at nine o'clock in the morning and getting through about five in the afternoon, and take a couple of thousand certificates home and work until about two o'clock in the morning signing certificates and bringing them back the next morning. That was my work. I was never placed in charge of the accounting and would not know how to.

With reference to page 196 of the minute book of the Italo Petroleum Corporation of America, minutes under date of December 8, 1928, as follows: "Resolved, that Paul Masoni as secretary and treasurer of this corporation be and he is hereby placed in entire charge of the auditing and accounting department this corporation, and appointed sole custodian of the account books, records and funds of this corporation," I do not know whether I remember that resolution. The minutes of the corporation were kept by the attorney; the minutes of the meetings were taken down by the attorney and the books brought in maybe once or twice a month and presented to me for signature. That is about all I know about the

minutes of the corporation. When I saw the refinery of the Brownmoor Oil Company, I did not think much of it, and it did not look good to me personally. I thought that the refinery that was owned by the Italo-American Petroleum Company was junk.

I resigned from the corporation to go home and see my old mother, and I knew I was not fit for the position of secretary of the company. I also saw certain things that were going on between Mr. McLachlin, assistant secretary, and Mr. Gordon, the vice-president of the company, which I did not like. I knew that I was there as a secretary only as a dummy, and I did not know really what was going on, so I thought the best thing for me was to resign and quit.

REDIRECT EXAMINATION

The document I referred to as having been signed by Mr. McLachlen and Mr. Gordon purported to give a royalty interest to Mr. Lacy, and I subsequently learned that Mr. Lacy had nothing to do with it.

JOHN M. PERATA,

a witness in his own behalf, testified under oath as follows:

I am one of the defendants in this action, and my occupation is that of an undertaker. I became a stockholder in the Italo-American Corporation in the early part of 1925, and afterwards became a director thereof, toward the latter part of the year 1925. I purchased stock in the company right along from time to time, and I have been connected with either the Italo-American Petroleum Cor-

poration or the Italo Petroleum Corporation of America up until October, 1928, at which time I resigned as president and director, but the resignation as director was not accepted at that time, although I handed it in. I believe I attended one or two meetings of the board of directors after I sent my resignation in.

When I first became connected with the Italo-American Corporation, I conversed with Courtney Moore, who happened to be my attorney, at that time, and he suggested that we get a certified public accountant firm to audit the books of the company, which we did by employing the firm of Robinson, Noel & Company. They made an investigation, which was satisfactory to me, and in which I believed, and I thereupon accepted a directorship in the corporation. Thereafter I was elected president of the company. I had never had any experience in the oil business up to that time. I first heard of Mr. Wilkes around September or October of 1927. At the time I became president of the Italo-American Corporation there were no practical oil men in the organization. After I became president of the organization, I endeavored to make effort to secure the services of practical men. I spoke to the accountant, to the attorney, and we decided at that time there would have to be an oil man, and upon the suggestion of Mr. Moore, who happened to be a Stanford boy, we contacted Douglas Fyfe, who was also a Stanford boy, and he spoke to me, stating he thought it would be advisable to seek the services of Mr. Fyfe. Moore wired Fyfe and Fyfe came to San Francisco, and a few days later was employed by the company. He was

sent down to the field in Los Angeles. At the time I became president of the Italo-American Petroleum Corporation, they had percentages in three or four wells in Long Beach, which was practically all of their assets.

Frederic Vincent introduced Mr. Wilkes to me. I also discussed with Mr. Spalding, of Los Angeles, Mr. Wilkes, who was known by Mr. Spalding, and he recommended him highly and suggested that that was just the kind of a man that we needed in our little organization. Mr. Wilkes made a very thorough investigation of the company before he went into it, and I gave him every facility to do so. Wilkes then became a stockholder and director of the corporation, and at the same meeting I believe he was made vice president and general manager. The Italo-American at that particular time only had a small interest in these wells that I mentioned, and the 10-acre lease known as the Wiley-Tobin lease, and Mr. Wilkes stated at that time that in order to be a successful oil company it was very essential to have oil lands. He became active and later on commenced negotiating to accumulate other properties. The Italo-American Company did not have much working capital on hand, and naturally could not buy any property without money; so it had been suggested at that time that a reorganization of the company would be necessary. Thereupon the reorganization of the company was discussed with the accountants and with the attorneys and ourselves. Our attorneys advised the formation of the Italo Petroleum Corporation of America, under the laws of Delaware, and the organization was accomplished through the efforts and under the guidance of our attor-

neys. Our attorneys at that time were Melvin & Sullivan, of San Francisco. When the Italo-American decided to reorganize and form the Italo Petroleum Corporation of America, the attorneys and certified accountants prepared the necessary data. The papers were filed with the representative of the Delaware Corporation in San Francisco and were sent back to Delaware, where the board was elected, and the papers sent back to California. It was then a question of carrying the Italo-American Petroleum Corporation over to the Italo Petroleum Corporation of America, and upon the advice of counsel we went before the Superior Court at San Francisco with a legal document, and Masoni and I were appointed trustees of the Italo-American to swing it into the Italo Petroleum Corporation of America. After the organization meeting of the Italo Petroleum Corporation of America, Wilkes, Masoni and myself were elected directors. The purchase of the assets of the Brownmoor Petroleum Corporation were discussed before the organization of the Italo Petroleum Corporation. An application was made to the Corporation Commissioner for the corporation to issue certain stock with which to purchase outside properties. The application stated that the Italo Petroleum Corporation was going to take over the assets of the Brownmoor Oil Company for a consideration of 600,000 units of Italo stock. It then developed that some of the stockholders of the Brownmoor did not want their stock but wanted cash in lieu of stock. The application had been filed and was in the Corporation Commissioner's office. My attention had been called to that fact, and it had been suggested at

that time that perhaps these individual stocks could be purchased. I spoke to Wilkes and he talked to me and asked me if I would care to back up Mr. Vincent for a certain sum of money, and I later agreed to put in my pro rata to purchase this stock. I understood that the application had been filed and that these people wanted cash in lieu of that stock and did not want to exchange their stock for Italo stock. It was a stock transaction pure and simple, in exchanging for the Brownmoor stock. Then Mr. Vincent went out and optioned, but he did not know how far he could go, for the simple reason that if the permit did not issue from the Corporation Commissioner we would have all been stuck. On my guarantee to Vincent I would have been stuck with those costs of purchasing those options, and that was my reason for guaranteeing Vincent & Company in the purchase of the Brownmoor stock. As a result of my guaranteeing Mr. Vincent, I received $25,000 as my share of the profit of the transaction. I took the cash instead of the stock.

When the statement came along, a discussion took place, and Masoni *insted* of on taking his stock, and he took stock. I only recall Vincent and myself being present at the conversation that I had relating to my backing Vincent & Company in the purchase of the Brownmoor stock. We spoke about this case of purchasing this stock from the people who did not want to exchange their stock in the Brownmoor Company to the Italo, and he told me that Vincent had options on certain stocks but did not have enough finances to go through with the deal, but he would go through providing we would be responsible for our pro

rata of that obligation, which was somewhere in the neighborhood of $140,000. After the discussion, Masoni asked me about it, and we agreed to stand our pro rata of that amount. It is my recollection that Masoni and I agreed to support Vincent in the purchase of these options. Masoni stated at that time that he did not want to have anything to do with Vincent & Company. We went back again and we told Wilkes, and Wilkes agreed that he would see that we were taken care of properly, and honestly in the event that we agreed to go in with Vincent in the purchase of the options. As a consequence, we agreed to back Vincent in the purchase of these options to the extent of approximately around $140,000, and as a result of that guarantee I later received from Vincent $25,000 as my share of the profits.

I put $5000 into the $80,000 syndicate, and received in return five thousand and some-odd dollars, which included the interest, plus I think 2500 units of Italo stock. I never participated in any negotiations had between the Italo-American Corporation or the Italo Petroleum Corporation of America looking to the acquisition of any of the properties that were acquired by those corporations. They may have been mentioned to me and I knew that there were deals going to come along. So far as the properties were concerned, I knew nothing of them. Mr. Wilkes did most of the work in connection with those negotiations, so far as the Italo companies were concerned. I was not very active from the time that Wilkes came into the company.

I subscribed to the big syndicate to the extent of $125,000. I paid $100,000 through the sale of Trans-

(Testimony of John M. Perata)

America stock and $25,000 which was on deposit with Shingle, Brown & Company. That $25,000 credit with Shingle, Brown & Company came from the sale of those units received from the sale of the Brownmoor stock which was applied to my credit with Shingle, Brown & Company. Instead of Vincent paying me the $25,000, they transferred it to Shingle-Brown, who credited me with it. The credit on Exhibit 218, the records of Shingle, Brown & Company, amounting to $99,716.00, plus the balance necessary to make up the $100,000, constituted my $100,000 payment, and I raised the $99,000 through the sale of Bank of Italy Corporation stock that I borrowed and sold, and that with the $25,000 made up my total payment of $125,000.

At the time the syndicate was formed and before and after that time I did not have any understanding or agreement with Robert McKeon or John McKeon or the McKeon Oil Company, or any of the defendants or persons mentioned in this indictment, or anyone else, that I was to receive any consideration whatsever in the way of stock from John McKeon or any other person. There was never any understanding between me and any of the defendants that I was to receive any benefit as a result of the purchase by the Italo Petroleum Corporation of America of the McKeon Drilling Company. The first time I heard of the 62,500 units of Italo stock that I later received from John McKeon was when I met Mr. McKeon one day on the street in San Francisco and we were talking about the syndicate and things of that type, and I told him about the unfortunate situation of the syndicate,

(Testimony of John M. Perata)

and he kind of smiled and said, "Well, don't worry, Johnny, things will be all right. You will have a surprise one of these days." Then about four or five months later I received a communication from Shingle, Brown & Company and they told me there was some stock down there and I sent a messenger down and I saw I had 6,250 units of stock. I signed a letter as a receipt for the stock, and there was no secrecy about it. From the time I joined the Italo-American corporation I continued to buy stock in that corporation, and I also bought stock in the Italo Petroleum Corporation of America, and from time to time advanced money to the corporation, some of which was repaid, but the company now owes me $25,000 which I loaned the company, less the $5000 paid on the company's note. That note is one of the matters involved in the suit brought by Clay Carpenter, the receiver, against myself and other persons, which is being threshed out in a civil suit.

During the time I was president of the Italo-American and the Italo Petroleum Corporation, I caused audits to be made of the books from time to time. Robinson, Noel & Company, the first public accountants whom we employed would come in once a month and go over the books and render a report, upon which I relied. During the time I was an officer of the company, attorneys were always employed, and I relied upon their advice. I am not an expert bookkeeper myself. I have no knowledge of participating in the writing or dictation of any of the correspondence relating to these companies. I knew that the annual stockholders' meetings and proxies were being

sent out, and those were attended to by Ward Sullivan, who prepared the form and the company sent them out.

I heard you refer to the letters known as indictment letters, which are referred to in the indictment. I did not dictate any of those letters, and personally had nothing to do with the mailing of them out. I never gave any instructions for the mailing of them out. If they were mailed out, they were mailed out in the ordinary course of the business of the corporation, and I had no personal knowledge of them. I have no personal recollection at this time of the different transactions that transpired at the various meetings of the Board of Directors.

CROSS EXAMINATION

(By Mr. Redwine) With reference to my contribution to the $80,000 syndicate, my recollection is that the syndicate was short $5000, and I made out a check payable to Fred Shingle. I never knew Fred Shingle at that time, and the check was made payable to Fred Shingle, and I received in lieu of that the $5000-odd, which was the principal plus the interest, and 2500 units of Italo stock. I believe Mrs. Lyle told me the syndicate was $5000 short, or that $5000 was open in the syndicate, and that is why that came in there. I made out this check for $5000 and left it in the Italo office. I did not talk to Shingle after the money was paid in. I didn't know him at that time. No one told me how much profit I might make out of the $5000, and no one told me what security the syndicate was to receive for the $5000. My recollection is that the syndicate was being formed of 80,000

(Testimony of John M. Perata)

shares of Brownmoor stock, and the $80,000 cash had to be applied to that for the obligations of the Brownmoor or words to that effect. I received the 2500 units of stock that I got from the $5000 from the firm of Shingle, Brown & Company, to whom the check was made. I think I still have that stock. My name does not appear on Exhibit 142, the syndicate subscription list to the $80,000 syndicate.

I first talked to Mr. Wilkes about the Brownmoor stock transaction that I was going to participate in the purchase of. That conversation took place after the application had been filed with the Corporation Commissioner. The conversation was after the Italo Corporation of America had finally signed a contract with the Brownmoor Oil Company. The application had been filed with the Corporation Commissioner. The Italo Corporation agreed to the acquisition of the properties and the merger of the properties, and was to exchange 600,000 units of Italo stock for the Brownmoor Company. When that application was on file with the Corporation Commissioner, Mr. Wilkes told me that certain stockholders in the Brownmoor wanted money instead of Italo stock. He did not tell me who those stockholders were or how much stock they owned. He told me they wanted approximately $140,000 for their stock. I remember he told me there was a Mrs. Cooper who wanted $60,000 for her stock. Wilkes did not tell me that he was going to contribute to the purchase of the Brownmoor stock. Wilkes did not tell me how soon I would have to put the money up or the amount. I agreed that I would stand for my quarter of the responsibility

pertaining to the purchase of this Brownmoor stock. I entered into this agreement because of my previous experience. I have had a little difficulty with a man by the name of Zanetti, Rorex, and so forth, pertaining to permits down here, and this permit was on file with the Corporation Commissioner, and I sincerely thought that perhaps this same class of individuals would attempt to do what they had done previously. That is the reason that after this application had been filed, this statement came forth, and I thought it advisable to purchase the stock and clear up any situation that might arise thereafter, and that is the reason really why I went in and purchased that. Wilkes said there was a chance of making some money out of the deal, but he did not tell me how much. I never advanced any money for the purchase of the Brownmoor stock because after the permit had been issued and the announcement of the sale of this stock it just went like a volcano, seeing the people come, and so forth. After the sale of that stock and the conclusion, we asked for a statement of Mr. Vincent, and that time Mr. Vincent came into the Italo office, and I happened to be there straightening out that situation, and he said it would be a personal favor to him if he could have that stock, and in order to assist him I let him have my stock, and he sold it, and in return for that I got $25,000.

After I first talked to Wilkes about the transaction, I had a talk with Mr. Masoni, in which Masoni and I guaranteed our pro rata of the purchase of the Brownmoor stock. We did not have any written agreement

(Testimony of John M. Perata)

showing our guarantee in that regard, but it was an oral guarantee. We did not ask Frederic Vincent & Company to give us any agreement showing what we were to receive out of the Brownmoor stock that they might purchase. In the purchase of this stock I would have one-quarter, Masoni one-quarter, and Frederic Vincent and George Stratton would have two quarters. Masoni and I were individuals in the transaction, and not partners, but each of us had one-quarter. Masoni and I together had a one-half interest and Vincent and Stratton had a one-half interest. After the stock was sold there came a time of settlement. I talked to Wilkes about the settlement, in the presence of Masoni, sometime around the first of July, 1928. As soon as the name of Frederic Vincent was mentioned, Masoni saw red and started off. Vincent came into the room, and he spoke and wanted a statement of the condition. Masoni did talk to Vincent on that occasion, and he demanded a statement, and they argued it out. Masoni said that at that time, "This is another one of your mixed up affairs." There were some hot words exchanged there, and I said, "Well, for God's sake! we are always arguing, arguing, arguing. Let's finish it up and straighten it out right now." Masoni wanted an accurate accounting of the stock there, which the compromise agreement was 21,000 units of that stock there. He was pretty well burned up at that time, and went out. I figured our pro rata owing to the activity of that particular security should have been more than the $25,000. I got 21,000 units of that stock the same as Masoni got, but owing to the fact that Frederic Vincent had sold so much stock and was short of stock, as an accommodation

(Testimony of John M. Perata)

to him I gave him the stock, which turned out to be the $25,000 which you have on the blackboard. The stock was delivered to me by Frederic Vincent, and I believe that Vincent agreed to give me $1.16 per unit for that stock. I did not ask Vincent for a receipt for the stock or for a written agreement as to how much money he would pay me for the stock.

I never knew the Montgomery account was in evidence or in existence. The Montgomery Investment Company was called to my attention by Fahey and Marles. I never made any demand on Vincent or Stratton for the money that they owed me for the 21,000 units of stock which I delivered to them. I never talked to Wilkes about the money that was due me from Vincent and Stratton for that stock, nor did I ever talk to Fred Shingle about it. I told Frederic Vincent & Company to place that money on deposit with Shingle, Brown & Company, and am positive I told him to place it in my name. I had no occasion to inquire of Shingle or Brown as to whether the money had been placed to my credit in my name with them. Vincent & Company notified me that the money had been sent to Shingle, Brown & Company.

These two receipts, Exhibit 317, dated June 30, 1928, for $25,000 from John Perata, and December 29, 1928, for $100,000, both signed by Fred Shingle acknowledging the receipt of this money from John Perata, are my receipts for my contribution to the big syndicate.

I agreed with the syndicate manager to put $125,000 into the big syndicate. Of this amount the $25,000 on deposit with Shingle, Brown & Company to my credit was

(Testimony of John M. Perata)

the first payment; I do not know how Fred Shingle handled the matter on his books. I did know that the $25,000 due me as the result of my transaction in the purchase of the Brownmoor Oil Company stock had been sent by Vincent & Company to Shingle, Brown & Company. I did not borrow that $25,000.

I did state to the post office inspectors, Fahey and Marles, that I had to borrow part of that money. I had a conversation with Fahey and Marles at the post office in San Francisco and they asked me a lot of questions, and I told them as near as I could to my recollection the truth. They presented me with this document here and this $80,000 syndicate, which I did not see and never saw it, and they also presented a paper of the Montgomery Investment Company of which I knew nothing, and I told them then and there that I knew nothing about those things, and that is the truth and nothing but the truth. I told them at that time that I had realized $100,000 from the $125,000 that I had subscribed from the sale of Transamerica stock. I may have stated to them that I borrowed the balance, or the other $25,000. I did borrow $25,000.

EXAMINATION BY THE COURT.

I made an agreement to buy certain stock of the Brownmoor Oil Company, and made $25,000 out of that transaction. I did not do that at the suggestion of Mr. Vincent. Mr. Vincent had an option to purchase certain stock which he wasn't in a financial position at that time to make the payments on, and in order that he could accomplish that he asked for assistance to support it. That was the occasion for me going into it.

(Testimony of John M. Perata)

Ten shares of Brownmoor stock were exchanged for six units of Italo stock. The Brownmoor stock that I received was converted into Italo stock and sold at the market. I personally had nothing to do with the sale of it, but it was sold and I thereby derived a profit of $25,000. I was also in the $80,000 syndicate, and it was my understanding that the 80,000 shares that were given to the syndicate subscribers came from the individuals, one of the people from the Brownmoor Oil Company who was interested in the Brownmoor borrowing that money. I assumed that he was willing to give the 80,000 shares of Brownmoor stock in order to secure the loan of that money. I did not know then and do not know now and have never inquired as to who that individual was. So far as the Brownmoor Company was concerned, that was all there was to it.

REDIRECT EXAMINATION

With reference to the conversation had with the post office inspectors, I borrowed 800 shares of Bank of Italo stock from my mother, which I sold in order to get the $100,000, and the account with Shingle, Brown & Company shows the transactions of my mother, my aunt, Mrs. Bachigalupi, and myself and my sister, Mrs. Taylor. It was carried for convenience sake in my name.

RECROSS EXAMINATION

(By Mr. Redwine) At the time I entered into the Brownmoor transaction I was the president of the Italo Petroleum Corporation. That $80,000 was part of the Brownmoor deal for financing the obligations that the

(Testimony of Raymond A. Earle)

Brownmoor had. I do not know whether that was used for that purpose or not. Mr. Wilkes spoke to us about the deal where we were to acquire an interest in the purchase of the Brownmoor stock. I do not know whether in my conversation with the post office inspectors I told them that the $25,000 subscription to the big syndicate had come as a result of my deal with Vincent & Company. I don't think I told them that I borrowed the $25,000.

RAYMOND A. EARLE,

a witness on behalf of the defendants McKeon, testified under oath as follows:

I am a petroleum engineer and field superintendent, and was educated at the University of Southern California. I am now employed by the receiver for the Italo Petroleum Corporation, and prior thereto was employed by the McKeon Drilling Company. I was one of the members of the McKeon organization that went over to the Italo Petroleum Corporation. I am and have been familiar with the properties of the McKeon Drilling Company that were turned over to the Italo Corporation since 1928. Part of my duties is to maintain the property in condition and keep the equipment in shape, the wells on production, according to the best practice.

At the time the McKeon properties were turned over to the Italo Company, the McKeon wells were mechanically in very good condition. I believe there were three wells being drilled at that time. Curtailment was put into effect on those wells in November, 1929, and has continued until the present time. The original curtailment

was 38.54 per cent, calculated as follows: In the Los Angeles basin the Italo Petroleum Corporation, including Santa Fe Springs, Huntington Beach and Long Beach, for the month of October, and prior thereto in 1929, before curtailment, the production of the entire basin for this company was 170,475 barrels of net oil, or an average daily rate of 5499 barrels. That was for all of the wells. For Signal Hill alone where the McKeon properties are located, for October, 1929, 81,441 barrels, or 2627 barrels per day flowing at a maximum amount, producing at 100 per cent, and then curtailment was instituted in November of 1929, carrying on to the present time, and the production of the entire basin for the Italo was cut to 81,883 barrels, or a drop of 88,591 barrels over the preceding month, or 51.97 per cent for the basis. In Long Beach 58,254 barrels for the month of November, or a daily rate of 1967 barrels, a drop in production of 27,187 barrels, or 28.47 per cent drop in Signal Hill alone. The biggest curtailment came in Santa Fe Springs. One of the properties turned over by the McKeon Drilling Company to the Italo belonged to the McKeon Company in fee title, and there is one well being drilled on that at the present time. That property is in proven territory, as are all of the other properties of the McKeon Drilling Company.

CROSS EXAMINATION.

By curtailment as I understand it in this State, there came about a decrease of the amount of production which eventually goes for sale to keep it off the market and keep it in the ground, and at the same time only sell what is

necessary for the current market, with the idea of maintaining a price at a reasonable figure. We were faced at this time with a serious drop in the price of crude oil to a point where it could not be produced if we continued to produce the amount of oil that was being produced. Thereupon each company was allowed to produce a proportionate amount according to his potential property at the particular time. They were trying to overcome the law of supply and demand so as to bring a higher price for the oil. Curtailment was brought about through agreement between the operators.

REDIRECT EXAMINATION

At the time the transaction was made in the summer and fall of 1928, the oil industry was in a very healthy condition, and there were no indications of the things that transpired in 1929.

RECROSS EXAMINATION

In 1928 the Signal Hill and Ventura Avenue were the only progressive fields in the State, and in September of 1928 Santa Fe Springs was proven to have a productive deeper zone, and continued drilling in there developed three additional zones which were very prolific, bringing wells ranging from 7000 to 8000 and 10,000 barrels, and the production of oil of such type of high gasoline content that it shoved all of the work to Santa Fe Springs and consequently production was still staying quite normal. The rapid decline had not hit Signal Hill at the time, and the excess oil from Santa Fe Springs was followed later by Kettleman Hills. We could not see those things in the oil industry and were not anticipated in 1928.

(Testimony of L. J. Byers)

L. J. BYERS,

recalled as a witness on behalf of the defendants McKeon, testified under oath as follows:

I am supervisor of accounting for the receiver of the Italo Petroleum Corporation, and have familiarized myself with the books of the Italo Petroleum Corporation of America and of the receiver. According to the records of that corporation, the McKeon properties were acquired October 15, 1928. From that date to December 31, 1928, the gross income for the two and a half month period was $284,118.55, from the McKeon properties alone. The operating expense for those properties for that period of two months and a half was $37,942.14, leaving a net operating income from the McKeon properties of $246,-176.41. The gross income from the McKeon properties alone, according to the books of the Italo Petroleum Company, for the calendar year 1929, was $1,056,509.68, and the operating expense was $101,937.19, giving a net operating income from the McKeon properties of $954,-572.49. The books and records of the corporation show that curtailment went into effect on November 1, 1929.

With respect to the normal income from the McKeon properties turned over to the Italo Corporation, allowing a normal decline, had the price remained the same and there had been no curtailment, I would say that for a two and a half months period in 1928 the McKeon properties earned net $246,000, which is approximately $100,-000 a month, or $1,200,000 per annum. If they had continued to produce on the same basis without curtailment

(Testimony of L. J. Byers)

and at the same price that they received in 1928, for the period from October 15, 1928, to May 31, 1933, that would be four years seven and a half months, that is, 55½ months, at $100,000 per month, would be $5,500,000 odd. That is what they would have produced net. Now, there must be taken into consideration the normal decline in wells, so we take 10 per cent off, and I would say they would have produced in excess of $5,000,000 to May 31, 1933.

CROSS EXAMINATION

In making my estimates I took into consideration a ten per cent depletion. The figures were based on net income less operating expenses. The operating expenses consist of repair labor, repair parts, pumping labor, *d*uel, maintenance, and field overhead. I am unable to state how much of the 1928 production was settled production and how much flush production.

The McKeon properties were acquired by the Italo in October, 1928. The Graham-Loftus properties were acquired by the Italo in June, 1928. In 1928 the Graham-Loftus properties produced a net of $1,233,000, against $246,000 in 1928 for the McKeon properties, but the Graham-Loftus properties were in operation for a considerable length of time before the McKeon properties. The testimony was objected to as not proper cross-examination. Objection overruled. Exception.

For the calendar year 1929 the McKeon properties had a net operating income of $954,572.49; the Graham-Loftus or Italo Oil Company properties in a like period had a net operating income of $1,336,535.34.

(Testimony of L. J. Byers)

Q What was the operating income of the McKeon properties as compared with the operating income of the Graham-Loftus properties for the year 1930?

Mr. Abrahams objected to the question as not proper cross-examination, not having been gone into on direct examination, and it further appearing that a well was brought in on the Graham-Loftus properties after the transaction with the Italo Company was closed.

Objection overruled.

A The McKeon properties had a net operating income for the calendar year 1930 of $447,358.55. The Graham-Loftus properties or Italo Oil Company properties had a net operating income of $371,344.60. The receiver of the Italo Petroleum Corporation was appointed December 13, 1930, and on December 10th, three days prior to the appointment of the receiver, the property known as the Graham-Loftus or Italo Oil Company was foreclosed by a mortgage holder, therefore the corporation operated the properties for eleven months and ten days of that year, and that is the basis of my figures for 1930. By reason of the foreclosure the receiver lost the Graham-Loftus properties for the Italo Petroleum Corporation of America.

Thereupon the defendant Paul Masoni testified as a witness on his own behalf, but due to the fact that he is not appealing his testimony is omitted herefrom.

(Testimony of Walter D. Abel)

WALTER D. ABEL,

a witness on behalf of the defendant Alfred G. Wilkes, William J. Cavanaugh and E. Byron Siens, testified under oath as follows:

I have been first assistant engineer and later chief engineer of the State Division of Corporations. I became employed by the Corporation Department in June, 1921, and resigned in October, 1930. I served as engineer in the Corporation Department under five or six or seven different Commissioners. As engineer I had charge of oil and mining cases, the technical analysis of the engineering reports and phases, and I wrote a great many permits myself and in association with other deputies in the office.

I was a technical and expert adviser and examiner of mining and oil features, and the engineering features involved in various applications that were made for the issuance of permits to issue stocks and bonds. Before becoming employed as engineer*ing* for the Department I attended the public schools and the high school in Denver, Colorado, entered the Colorado School of Mines, and graduated there in 1906 as a mining engineer. I followed my profession in the western states and the Republic of Mexico as mine operator and examiner, working also as lessee, until I took up my permanent residence in California in 1921, and shortly thereafter entered the employ of the State Corporation Department. I continued my studies along engineering lines, and did considerable field work, and during one of those years I attended a night class at the University of Southern California in oil

geology, in order to brush up and keep up to date in that particular phase. I became chief engineer of the department sometime in 1923, and during my employment in the department I was actively engaged in the examination of either the properties or the reports that were made respecting them in connection with applications to the Commissioner for permits. There were many such applications, and in that employment I became generally familiar with the various oil structures of the State. My training as a mining engineer included also the study of oil geology. I studied the oil geology of the various structures in California during that time, and in 1928 I was generally familiar as a mining geologist and engineer with the various oil properties in California.

I remember the filing of an application by the Italo Petroleum Corporation of America in 1928 for a permit involving a large number of properties. The examination of the reports that were made of those properties was referred to me. I, myself, examined the reports that were made respecting those properties. These reports which are part of Exhibit 25 are reports that I examined at that time, and they cover appraisements of the properties of the McKeon Drilling Company, the Graham-Loftus properties on Signal Hill, properties of the Zier Oil Company, the Premier Oil Company, the Modoc Oil Company, and Section Seven and some other properties. Prior to the time that these reports were submitted to me I had a conversation with Maurice C. Myers and Mr. Wilkes respecting the values of those properties. I told them that I would require them to have, before their permit was

(Testimony of Walter D. Abel)

given final consideration, to submit appraisements of all of the properties that were involved in the permit, and they asked me what appraisers would be satisfactory to me or to the Corporation Commissioner. I named three appraisers that would be satisfactory. I told Mr. Wilkes that a man named C. S. Thomas, a petroleum and oil engineer, and one named Soyster, and a third one would be satisfactory to me. There was a reference in the conversation to Mr. Soyster having been previously employed by the company, and when Wilkes left there it was understood that he would employ Mr. Thomas to do the work if he could be employed. The reputation of Mr. Thomas and Mr. Soyster for ability and integrity as petroleum engineers and geologists was excellent at that time. I had no interest in their selection. They were men in whose judgment and opinion I had confidence.

After I received those reports I made a report respecting them. This schedule or report, part of Exhibit 25, is the report which I made, together with the other reports showing the minimum value given by any engineer of each of the properties.

The report identified by the witness has heretofore been set out in the bill of exceptions in connection with the findings of fact and conclusions of law of Assistant Commissioner H. A. I. Wolch.

At the time I examined the report of Mr. Thomas on these properties I considered it was made on a sound basis and in accordance with standard engineering methods and practices of valuing properties of this kind.

(Testimony of H. A. I. Wolch)

Dr. Starke has a very good reputation for ability and integrity as a petroleum engineer and geologist.

(Examination by Mr. Meader, attorney for Mr. Myers:)

In connection with my work in handling and passing upon various applications for permits, I came in personal contact with various counsel for the applicant company. I know Maurice C. Myers, an attorney in Los Angeles, and came in contact with him frequently in a business way. In any business dealings I ever had with Mr. Myers as attorney for any applicant, I never knew anything of my own personal knowledge in connection with those matters or my acquaintanceship as to any act or actions or statements of Mr. Myers that were not highly ethical.

H. A. I. WOLCH,

called as a witness on behalf of the defendants Wilkes, Cavanaugh and Siens, testified under oath as follows:

I am and have been an attorney at law since May 1, 1911. I was a deputy in the State Corporation Department from 1922 up to the 30th of June, 1930. In 1928 I became Assistant Commissioner of Corporations in charge of the Los Angeles office, and as such all of the other deputies in the Los Angeles office were under my direct supervision. I was answerable only to the Commissioner of Corporations.

The procedure in handling an application for a permit was this in 1928: The application was filed with the Chief Clerk, and it was then assigned to the various deputies for handling. The deputies would analyze the application,

(Testimony of H. A. I. Wolch)

make the required investigation, and would prepare a permit supported by what is known as a file memorandum, giving their justification for the issuance of the permit, supported by such financial statements and engineering reports as an application would justify or require, and then the application would be forwarded to the signing deputies, chief deputy, the deputy in charge, for signature. I recall an application filed in the summer of 1928 by the Italo Petroleum Corporation of America for a permit. Such an application would be assigned to the mining or petroleum engineer for investigation. At that time Mr. Abel was assigned the investigation of this application.

Before the permit was issued he made a report to me respecting the properties that were involved in the application. Mr. B. H. Whitaker, certified public accountant, and the chief auditor for the Corporation Department, made an investigation of the financial condition of the company, and submitted his written report.

This is my signature on page 16 of this document, part of Exhibit 25. I made that report. The application of the Italo Petroleum Corporation of America was first assigned to the engineering department headed by Walter D. Abel. Some complaints were filed and they were referred to the complaint department, composed of Mr. Asa Harshbarger and Ivan Hiler. The financial statement was referred to B. H. Whitaker, the chief auditor for the State Corporation Commissioner. Each of these various employes made reports of their investigations to me before the permit was issued. Mr. Whitaker made his analysis of the financial condition of the company, and Walter Abel made his mining report or engineering

report, and prior to the signing of this report I conferred with all the persons named in the report, Vernon S. Gray, Mr. Harshbarger, Mr. Abel and Mr. Whitaker. Before the permit was issued a public hearing was held, respecting these complaints and the matters involved in the application for permit. The hearing was held by myself and other deputies; I was the presiding deputy at the hearing.

This report correctly and accurately recites what took place at the hearing, the parties present and the disposition of the matter. I did not make any report of what I had done to Mr. Friedlander, the Commissioner, but simply filed the report and the permit was issued.

A short time before the permit was issued I had a conversation respecting the application with Mr. Myers, the attorney for the company, and Mr. Wilkes. Mr. Myers stated in substance or inquired as to the status of the application in the department, and how far it had progressed. I advised him that the matters were being handled by the deputies and the engineer, and told him that I understood there were some complaints filed against the corporation which would have to be determined, and I believe I referred him to the engineer for some detailed information as to what the condition or status of the handling of the application was at that time. Mr. Myers was anxious to get a quick disposal of the application, and I believe I told him that there was no obstacle other than the complaints and that the permit would be forthcoming just as soon as the engineer and the deputies and auditors were satisfied that a permit could be justified. I became familiar with the complaints that had been filed after

(Testimony of H. A. I. Wolch)

they were filed, and when I read the complaints I learned for the first time that they had no relation at all to the Italo Petroleum Corporation of America, but referred to a transaction that transpired prior to this organization, and referred to another corporation. There was some controversy between Mr. Zanetti and Mr. Rorex.

I had a conversation with Myers and Wilkes prior to the issuance of the permit and about the time that the hearing on these complaints was concluded. I inquired of Mr. Wilkes in what manner he proposed to raise the capital with which to purchase certain properties. He informed me that there was a possibility of raising the capital to acquire certain properties and that a large sum of money had been virtually subscribed or committed for to meet the contract obligations of the Italo Petroleum Corporation in the acquisition of certain properties. He told me that a group of individuals had formed a syndicate to furnish the necessary cash to pay for the properties. He presented me with a mimeographed document, which I believe was the form of the syndicate agreement.

At Meyers' suggestion I took him into the Commissioner's office and the syndicate agreement was discussed with the Commissioner. In the Commissioner's office Mr. Wilkes explained or said that this document was a document that bound certain individuals to an obligation to raise a certain amount of money to be contract obligations for the purchase of property, and that he had discussed the matter with me, and in general that that was the method by which the properties were to be acquired and the method of raising the money to acquire the properties. I understood at that time that the sum of about

(Testimony of H. A. I. Wolch)

a million dollars or a little less than a million dollars had already been raised by the syndicate and paid out for the properties, and this statement may have been made in the presence of the Commissioner. The Commissioner did not at any time before the permit was issued give me any instructions or directions that the permit should be issued, or any other instructions or directions with respect thereto. So far as I know, the Commissioner did not give any deputy authorized to sign a permit any instructions or directions respecting its issuance. No one other than Wilkes or Myers ever approached me personally with respect to the issuance of the permit, urging that it be issued, or urging that it be issued on any particular terms.

(Examination by Attorney Meader, for Defendant Myers)

It was thereupon stipulated that a subpoena duces tecum was part of the Corporation Department file, Exhibit 25, was issued prior to the hearing on August 7, 1928, on the complaints.

(Further Direct Examination by Mr. Carnahan:) The Commissioner made no suggestion to me respecting the part that I took in holding that hearing that I have referred to, but I held it on my own authority and volition, without any suggestion from the Commissioner or anyone else. Under the permit as issued we authorized the corporation to issue the 12,000,000 shares of stock to a trustee instead of directly in exchange for the properties, as was requested in the application for permit. I desired to create a trustee relationship between the corpo-

(Testimony of H. A. I. Wolch)

ration and Mr. Myers, because there was some doubt or uncertainty as to the actual amount of capital that was necessary to purchase certain properties, and there was also a doubt as to the exact number of shares of stock that had to be issued in exchange for the properties. Mr. Myers was the attorney for the corporation, and I required that arrangement with the understanding further that if there was any residue of stock left necessary to acquire these properties that he would hold them as trustee for the benefit of the corporation, to be returned to the corporation for cancellation. That is, as trustee for the corporation he would return the residue or excess.

CROSS EXAMINATION

We do not have any deputies in the office regularly hearing complaints. The complaints relative to the Italo Petroleum Corporation of America were in the hands of Mr. Hiler. On the day of the hearing I was present at the hearing and I had others there, including Mr. Hiler. One of the reasons for selecting Maurice C. Myers as trustee of the stock was that the number of shares and the amount of money was not quite determined. They had an estimate and knew about how much was required, and rather than have the permit issued to the persons named in the application it was issued to Mr. Myers as trustee for the purposes set forth in the application. We had a policy of a commission arrangement not to exceed 20 per cent of the amount received in cash through public sales of stock. By that I refer to stock brokers' commission for the sale of stock to the public. With respect to commissions paid to individuals to acquire property in the ordinary real estate deal, we are not interested in

that whatever. We were interested in how much of the stock issued by the corporation was to be paid to brokers in the form of commissions for acquiring property, but the application contained the conditions under which the permit or under which the stock was to be determined and distributed, and that was what we were going by.

I did not know anything concerning the application itself other than the matters that were reported to me by the engineer and the auditor.

JOSEPH WEINBLATT,

called as a witness on behalf of the defendants Wilkes, Cavanaugh and Siens, testified under oath as follows:

I have known the defendant Alfred G. Wilkes since 1925. I also know Charles Behr. I had business transactions with Mr. Wilkes in 1926 in connection with theatre sales, by which I either sought to sell to him or buy from him some theatres. As a result of these transactions with Mr. Wilkes and his occupancy of part of my office space in Hollywood, Mr. Wilkes owed me quite a little money. He still owed me money in the summer of 1928 in connection with these theatrical enterprises. This indebtedness had nothing whatever to do with the Italo Petroleum Corporation of America or the Italo-American Petroleum Corporation. I was never employed by Mr. Wilkes to perform any services in connection with the Italo Company.

In the latter part of July, 1928, I discussed with Mr. Wilkes the obtaining or the pendency of an application for a permit to issue stock in the Italo Petroleum Corporation of America. This conversation took place in

(Testimony of Joseph Weinblatt)

Mr. Wilkes' rooms in the Biltmore Hotel. I do not recall anyone else being present. Wilkes told me that they had taken over some properties in San Francisco and were organizing or merging a large oil company, that their company had a permit pending before the Corporation Department, and he had had some difficulty in getting it because a large number of citizens had filed complaints claiming moneys due them from the old Italo Company, and that the permit was being held up because of those complaints. I asked him what the complaints were, and he said for money which these men claimed were owed to them, not by him or his associates but by the former associates in San Francisco from which they took these properties over, and he told me it was just a holdup, that they were trying to get some money out of him before he could get the permit. He said that there was going to be a hearing before the Corporation Commissioner on the following week, and he thought I knew Mr. Friedlander intimately and wanted me to talk to Mr. Friedlander with a view of seeing that they got a square deal. I said I knew Mr. Friedlander very, very intimately, and socially for 20 years, when he was an obscure lawyer, and when he first came to California he officed with me, and that I felt as far as Mr. Friedlander was concerned that nobody could hurt his cause if he had a just cause, but if he wanted me to see Mr. Friedlander I would be glad to talk to him about it. Mr. Wilkes did not offer to pay me for that service, and I was simply acting in a friendly way. I saw Mr. Friedlander on one occasion, at which only the two of us were present. I told Mr. Friedlander what Mr. Wilkes had said and that he was

a client and a friend of mine, and asked him if there was anything wrong with his permit at that time that would justify him in refusing to grant it, and he told me that there was no justification for not granting that permit, although it was quite a large permit for that office at that time. He said the properties in the company had been checked over very carefully by the petroleum engineers as well as the department of corporations, and there was no reason on earth why these people should not have a permit except there had been some very nasty complaints filed against the company, and certain rumors had been suggested by persons who felt dissatisfied, because it was right after the Julian fiasco, and that no friend or foe could persuade him to give that permit unless the record showed these people were entitled to it. I told him I had learned that these complaining witnesses were claiming money for something Wilkes and his associates were not responsible for, and he said he was not cognizant of that fact, but that nevertheless the hearing had been set for the following week. That was the substance of the conversation with Mr. Friedlander, and I reported it back to Mr. Wilkes and told him he need have no compunction about getting his permit, that Mr. Friedlander had said that he or any other man would be entitled to a permit as long as they were on the square and legitimate, and all he would have to clear up in the premises was the question of the complaints, at that time three or four of them. I do not remember having a conversation with Mr. Friedlander over the telephone in regard to the Italo. The only time that I talked to Mr. Friedlander was when I talked to him personally. I did not discuss the affairs of the Italo or the permit over the

(Testimony of Joseph Weinblatt)

telephone with Mr. Friedlander. I did not promise Mr. Friedlander any reward or compensation for making or allowing the permit. I received around $3500.00 from Mr. Wilkes. The money was paid for this: During the time that he was in this proposition of trying to get the permit and I had been chasing around back and forth with him and listening in on the conversations, he told me that when everything was all right, that he knew he owed me a little money, which I have the records here, and if everything came out all right he would be in a position to pay me the money he owed me. A few days after that he gave me a part of the money, it must have been $2000 or $2500 or maybe $3000, and at the time he gave me this money he gave it to me in cash, and it was in $1000 bills. At that time I made my headquarters with Mr. Behr and he was always financially distressed. I think Behr was present at the time I got this money. That is the only time I recall that Mr. Behr, Mr. Wilkes and I were together. At that time Mr. Wilkes owed me approximately $1963.21. When I received the money from him we cancelled the entire indebtedness.

CROSS EXAMINATION

I speak Yiddish. I have known Mr. Behr for ten or twelve years. He is an oil producer and I am a broker. I had business relations with Mr. Wilkes concerning the disposition of some theatres that he and his brother had, and in the disposition of those theatres I incurred expenses amounting to some $1200 or $1300. He owed me further sums and made some payments on it, and in 1928 he owed me about $1900. He gave me the $3000 or $3500 in payment of this obligation, and it was in

(Testimony of J. M. Friedlander)

$1000 bills. My best recollection is that it was $3000, but it might have been $2500. I remember that because I broke up one of the $1000 bills and gave Mr. Behr $500 of it. I gave him more than $500. This money was paid to me by Mr. Wilkes after the permit was granted.

J. M. FRIEDLANDER,

a witness on behalf of the defendants Wilkes, Cavanaugh and Siens, testified under oath as follows:

I was Corporation Commissioner of the State of California from sometime in March, 1927, until March, 1929. I believe there was an application for a permit filed with the department by the Italo Petroleum Corporation of America and a permit issued authorizing the issuance of 12,000,000 shares of stock for a group of oil properties. I had nothing to do with and did not give any instructions or directions respecting the consideration or investigation of the application for that permit other than at one time I was advised that complaints were submitted to the Department, filed with the Department, concerning a permit that was ready for delivery, and at that time I ordered the deputy in charge of the Los Angeles office, Mr. Harry Wolch, to investigate it and hold it up and hold an open hearing. The regular procedure that was fixed in the Department was followed in connection with this application for a permit.

I know Mr. Joseph Weinblatt. Mr. Weinblatt did not at any time, by telephone or personally, make any request to me that the hearing or consideration of this application for this permit of the Italo Company be referred to Harry Wolch. I did not give any instructions in connection

with that application that the consideration of it should be referred to Mr. Wolch, or that it should be acted upon by any particular deputy. While that permit was under consideration I did not make any suggestion to any one of my deputies or employees that the permit should or should not be issued, or as to any condition that should be inserted in or omitted from the permit.

CROSS EXAMINATION

I understand Yiddish indifferently.

GEORGE J. PRESLEY,

called as a witness on behalf of the Defendants Brown, Shingle and Jones, testified under oath as follows:

I have resided at San Francisco for thirty-four years, and am a graduate of Stanford University. I am an attorney at law, and for the last two years have been the manager of the San Francisco Chamber of Commerce. I was formerly president of the Alumni Association of Stanford University, and a member of the Board of Trustees of that university. I have a membership in the firm of Thomas, Beady & Presley, San Francisco.

I have known the defendant Horace J. Brown for about fifteen years, and know that he resides in San Francisco. I have known the defendants Fred Shingle and Axton F. Jones for twenty-five years. I know the general reputation of Horace J. Brown, Fred Shingle and Axton F. Jones in the community in which they reside, for truth,

(Testimony of James K. Lockhead)

honesty and integrity. That reputation is very good. From my own knowledge of the general reputation of these three men in the community in which they reside, for truth, honesty and integrity, I would believe them under oath implicitly, or not under oath, and would believe implicitly anything that they told me.

No cross-examination.

JAMES K. LOCKHEAD,

a witness on behalf of the defendants Shingle, Brown and Jones, testified under oath as follows:

I have resided in San Francisco for twenty years and am vice-president of the American Trust Company in San Francisco. Most of my business life has been banking, connected with the Union Trust Company of San Francisco first, and the Mercantile Trust Company, which is now the American Trust Company.

I know the defendants Horace Brown, Fred Shingle and Axton F. Jones, and have done considerable banking business with the firm known as Shingle, Brown & Company in San Francisco. That business has been a large business, and in a period of four or five years we have loaned them three or four million dollars on different occasions.

I know people in and around San Francisco who know these three men. I know the general reputation of the defendants Horace Brown, Fred Shingle and Axton F. Jones in the community in which they reside, for truth, honesty and integrity, and that reputation is excellent. I would believe them under oath or not under oath.

No cross-examination.

(Testimony of Hartley F. Peart)

HARTLEY F. PEART,

a witness on behalf of the Defendants Brown, Shingle and Jones, testified under oath as follows:

I have lived in San Francisco all of my life, and am an attorney at law. I was attorney for the State Fish and Game Commission for about five years, attorney for the Treasurer of the City and County of San Francisco on inheritance taxes, and special counsel for the State Comptroller for a number of years, and I have also been attorney for the California Medical Association for a great many years.

I have known the defendant Horace J. Brown for about eight or ten years and the defendant Fred Shingle for about the same period of time. I know the defendant Jones by reputation. I know the general reputation of the defendants Horace J. Brown, Fred Shingle and Axton F. Jones in the community in which they reside, for truth, honesty and integrity, and that reputation is very good. I also know the general reputation of the firm of Shingle, Brown & Company in San Francisco for truth, honesty and integrity. From my knowledge of the general reputation of the defendants Horace Brown, Fred Shingle and Axton Jones and of the firm of Shingle, Brown & Company, I would believe them under oath or not under oath. They are all men of honor and integrity, to my knowledge.

No cross-examination.

(Testimony of Walter Hood)

WALTER HOOD,

a witness on behalf of the defendants Shingle, Brown and Jones, testified under oath as follows:

I am a partner in the firm of Hood and Strong, certified public accountants in San Francisco and Los Angeles. I have lived in San Francisco all of my life and have maintained a place of business there since 1915. Our firm was formerly the auditors for the San Francisco Stock Exchange and have been auditors for the Wells, Fargo Bank of San Francisco.

I have known Horace Brown since about 1915, when he was the first deputy corporation commissioner of the State of California, and have known Fred Shingle since about 1918. I also know the firm of Shingle, Brown & Company. They have been in business since 1919. I know the general reputation of the defendants Horace J. Brown and Fred Shingle in the community in which they reside, for truth, honesty and integrity, and also the general reputation of the firm of Shingle, Brown & Company in the community of San Francisco, for truth, honesty and integrity, and fair business dealings. The reputation of these men and of this firm for these qualities is good, and I would believe them either under oath or not under oath.

(Testimony of Howard G. Tallerday
Edwin M. Daugherty)

HOWARD G. TALLERDAY,

a witness on behalf of the defendants Brown, Shingle and Jones, testified under oath as follows:

I have lived in San Francisco since 1918, and am a manufacturer. I am with the Western Pipe & Steel Company, and am now president of that company, and prior thereto was executive vice-president.

I know the defendants Horace J. Brown, Fred Shingle and Axton F. Jones, and know their general reputation and that of the firm of Shingle, Brown & Company in the community of San Francisco, for truth, honesty and integrity. That reputation is the very best. From my knowledge of that general reputation I would believe them under oath. The general reputation of the firm of Shingle, Brown & Company for honesty and fair business dealing is very good.

EDWIN M. DAUGHERTY,

a witness on behalf of the defendants Shingle, Brown and Jones, testified under oath as follows:

I am Commissioner of Corporations of the State of California and was first appointed as such February 1, 1921. I resigned that position in September, 1926, and was again appointed thereto September 1, 1931. Between those two terms of office I was vice-president of the Anglo-London-Paris Company, bond department of the Anglo Bank of San Francisco, and I have known the defendant Fred Shingle since about 1921, and the defendants Horace Brown and Axton F. Jones about the same length of time.

(Testimony of Bradford M. Melvin)

I know the general reputation of the defendants Fred Shingle, Horace J. Brown and Axton F. Jones in the community in which they reside, San Francisco, for truth, honesty and integrity. That reputation is good, and I would believe any one of those three men under oath.

BRADFORD M. MELVIN,

a witness on behalf of the defendants Shingle, Brown and Jones, testified under oath as follows:

I am and have been an attorney at law for about fourteen years, and maintain offices in the Balfour Building, San Francisco, being a member of the law firm of Gregory, Hunt & Melvin. My former partner, T. T. C. Gregory, was killed the 4th of this month, and former Judge William H. Hunt of the United States Circuit Court of Appeals, Mr. Ward Sullivan, Mr. Wallace Sheehan and myself are the remaining members of the firm. I am a son of former Justice Melvin of the California Supreme Court.

I have known the defendant Fred Shingle about twenty years and the defendant Horace Brown about fifteen years, and the defendant Axton Jones about twenty years. I have known them intimately in a social and business way. I know the reputation of Fred Shingle, Horace Brown and Axton Jones in the community in which they reside, for truth, honesty and integrity, and that reputation is the highest that it could possibly be. I would believe any statement that any one of those three men would make under oath or not under oath without any qualification.

(Testimony of Bradford M. Melvin)

At one time we were attorneys for the Italo Petroleum Corporation, and were their attorneys during the time that they were accumulating a large group of properties in the summer of 1928. My law firm at that time was the firm of Melvin & Sullivan.

I remember an interview between Horace Brown and myself with J. M. Friedlander, Commissioner of Corporations, in July or August, 1928, preceding the company's obtaining a permit in connection with the issuance of stock in the accumulation of a large group of properties. Horace Brown came in to see me one morning, with the result that he and I had a meeting with Corporation Commissioner Friedlander. That was about a month or so before the issuance of the permit. Mr. Brown and I went into the Commissioner of Corporation's office and told him that we had just heard that a man in Los Angeles had demanded money of the Italo Petroleum Corporation of America, stating that he would, to use the colloquialism, deliver the permit when that money was paid, and if the money wasn't paid the permit would be held up, and that he had indicated that the money was to be paid to the Commissioner of Corporations of the State of California. Mr. Brown had given me that information that morning, after he had received it. After he gave me the information we had gone to two friends, men who were reputed to be friends of Friedlander's in San Francisco, men of substance, and in whose judgment we had confidence, and told them about it, and they said they didn't believe it, and both advised us to go straight to the Commissioner of Corporations himself. The Commissioner smiled and said of course it wasn't true, and that

his office was not for sale, that he had heard nothing of the sort in the way of rumors, and that he was confident that his deputies were not peddling him, and said it was nice of us to have come and told him but that we could go away and forget it. That was the substance of the conversation.

In the fall of 1928 we represented Fred Shingle as syndicate manager in a controversy that he had with Frederic Vincent & Company, and we also represented the Italo Petroleum Corporation to such extent as they were interested in the controversy. A letter had been received by Mr. Shingle as syndicate manager from Frederic Vincent & Company, setting forth in some detail asserted losses that Vincent & Company had suffered in connection with the sale of stock, probably of the syndicate. This letter is Exhibit 174. Attorney Joseph McInerney called me before I had seen this letter and was very imperative or imperious and demanded that I should come right over to his office and see that that matter was adjusted. I told him I wasn't prepared to negotiate fully about that because I wasn't informed, and when I was I would let him know. A day or two later I talked to him.

The substance of the controversy was this: Frederic Vincent & Company made a demand for a lot of stock and that it be delivered to them. They represented to Fred Shingle, syndicate manager, that they had sold only about 100,000 shares of stock. Fred Shingle as syndicate manager made a commitment to the brokers' pool of all the stock excepting 100,000 shares needed to fill Vincent's demand, and after that commitment had been made Vincent made a demand for three or four

(Testimony of Bradford M. Melvin)

hundred thousand shares more from the Syndicate, and also some other source, and he made a threat that he would start suits against the company or against the syndicate manager to enjoin the sale, and a settlement was finally arranged of that matter. This resulted in the transfer of some of the syndicate stock to Vincent, and the transfer from the McKeon escrow to the syndicate manager of some of the stock to replace that stock.

Q Did you have any subsequent conversations with him or with anybody else representing Vincent & Company?

MR. REDWINE: Objected to on the ground that it is incompetent, irrelevant, and immaterial, and would be hearsay and hasn't anything to do with the issues in this case.

THE COURT: Anything more?

MR. SIMPSON: It is preliminary, your Honor, if he did have any such, and who were present, and the time and so on.

THE COURT: Objection sustained.

MR. SIMPSON: Exception.

MR. CARNAHAN: I do not want to misunderstand your Honor. Do you mean—

THE COURT: I mean this, Mr. Carnahan: I don't see just how important or why it is important to go into this controversy which was detailed and outlined by Mr. Melvin here, very early in this case. There was a controversy between Vincent & Company and the Shingle-Brown, I believe, or the Italo, regarding these stock losses. Well, there was a settlement made of that, and that is in evidence; I think you have outlined it here, a

moment ago. Now, assuredly, the arguments on one side or the other or conversations between counsel certainly wouldn't throw any particular light upon that. Each counsel would champion the justice of his own side, of course, but I have no objection. I think it is already in evidence the sum total of that controversy, what was done. That is my understanding. Now, if you have a different understanding, you are at liberty to enlighten me.

MR. CARNAHAN: Well, I confess, your Honor, that I tried to get that story out of Mr. Stratton, and out of Mr. Vincent. I was quite insistent upon it in examining them to get that. Now, if there is no question on the part of the Government, if they will admit that that transaction, the settlement and transfer of Jack McKeon's stock so transferred over to Frederic Vincent & Company was bona fide and in good faith and was not a transaction that is charged in the indictment, then I am perfectly content—

THE COURT: Well, now—

MR. CARNAHAN: They have charged that Jack McKeon made a lot of transfers under secret agreement, and I want to show how it was transferred, and when it was transferred, and what preceded it.

THE COURT: Well, now, in making my statement I do not on my own responsibility—I am not answering for what impression the jury may have. I am merely giving my recollection, according to my own understanding, you understand.

MR. CARNAHAN: Yes, your Honor, I understand.

MR. REDWINE: Well, the fact that Mr. McKeon did advance some of his stock is claimed by the Govern-

(Testimony of Bradford M. Melvin)

ment, but we are talking about the fact that when it was advanced and 100,000 released, that was split one-fourth to Shingle, one-fourth to the McKeon Drilling Company, one-fourth to Wilkes, and one-fourth to Siens. That is where we claim fraud.

THE COURT: I think the ruling has been made.

MR. CARNAHAN: Well, if your Honor please, since he has made his speech to the jury, may I say this: They not only charge that, but they charge that Jack McKeon had a secret arrangement to turn back 2,500,000 shares, but they do not charge us—but we haven't had a ruling on that—

THE COURT: Yes.

MR. CARNAHAN: They charge some of the other defendants with having knowledge of that and having been guilty with them equally of that very thing. We are bringing the attorney here who had charge of the matter, to show the good faith in the matter, and to show why it was made, and show it wasn't done as charged in the indictment. I am going to show we got the money, of course, but that is a different matter.

THE COURT: What was the final agreement made as a result of the controversy described by Mr. Melvin?

MR. REDWINE: That is in evidence, your Honor.

THE COURT: The agr*eme*nt?

MR. REDWINE: The escrow instructions with the Bank of Italy in San Francisco, and that is sufficient.

THE COURT: It seems to me that should be sufficient.

MR. CARNAHAN: If Mr. Redwine will go on the stand, and be under oath, then I will get it. The settle-

(Testimony of Bradford M. Melvin)

ment isn't in evidence. The escrow instructions are in evidence, but that wasn't the settlement.

THE COURT: You do not mean that a total of 2,500,000 shares were given to Shingle-Brown in settlement of this controversy?

MR. CARNAHAN: No, I do not mean that, your Honor.

THE COURT: No? How much?

MR. CARNAHAN: Well, let's go back on the thing and we will get the story straight.

THE COURT: All right.

MR. CARNAHAN: What happened was this: Frederic Vincent & Company had a contract to sell stock. They weren't selling it fast enough, or weren't paying the money in fast enough in September to meet these things. Wilkes came to Shingle and the rest of them and asked Shingle to arrange a brokers' pool to help get the stock out and to get the money in to help out in paying for the properties. Shingle cancelled the Frederic Vincent & Company contract. Before that was done they inquired of Vincent and asked him how much stock he had sold under his contract. His report was to them that he had sold about 100,000 shares. Then they set up their brokers' pool and they saved out, as the evidence will show—but it isn't in the contract—they saved out about 122,000 shares in the syndicate to furnish to him under his contract. After that was all done and it was all said and they had made their commitment to the brokers to give them options on it, he came in—

THE COURT: Who are "they"?

(Testimony of Bradford M. Melvin)

MR. CARNAHAN: Fred *Single,* and Horace Brown helped them do it—it is the same thing.

THE COURT: All right.

MR. CARNAHAN: After that was all said and done, and they had made their commitment to the brokers, and given them the options on this stuff, then Frederic Vincent disclosed he had sold about 400,000 shares instead of 100,000, and he demanded the other 300,000 shares, or he would kick up a row and start a suit to try and enjoin Fred Shingle, and that was right after the pool had been arranged. They didn't have the stock in the syndicate to supply. They had to go some place to get it, and there wasn't any place to go except to Jack McKeon. Jack McKeon agreed to furnish it out of his stuff, the stock which they couldn't furnish out of the syndicate. and that is the way he got it, and that is a part of the stock that Jack McKeon furnished there to settle that row that the Government has now charged Jack McKeon had a secret arrangement to divide up among these people. That is the story I am trying to get at.

THE COURT: Well, what is the witness supposed to know about that? Just tell what he knows.

MR. CARNAHAN: My understanding is, your Honor, and I state it as an attorney, the way it came to me, my understanding is that Mr. Melvin represented Mr. Shingle—

THE COURT: Yes, he says so, as syndicate manager, however.

MR. CARNAHAN: —in the controversy, and the two attorneys had a conversation, representing the two sides, Mr. McInerny representing Vincent, and he repre-

(Testimony of Bradford M. Melvin)

senting Mr. Shingle, and he is the one who had the original knowledge of this situation, and it would be hearsay as to anybody else but him.

THE COURT: Well, I understand; but do you not agree that a certain—

MR. CARNAHAN: I thought he was present at times, as I understand it, but I don't like to assert it, I am not certain enough of it, that he was present and had conversations between Shingle or Brown and Vincent.

THE COURT: Shingle and Brown or Vincent?

MR. CARNAHAN: No; Shingle or Brown and Vincent.

THE COURT: Yes. You do agree that a certain amount of stock, did you say 400,000 shares, was furnished to Vincent & Company in order to complete their contract?

MR. CARNAHAN: Satisfy their demand.

THE COURT: And that was a settlement of this matter?

MR. CARNAHAN: A part of that 100,000 odd shares was furnished from the syndicate and the balance of it was taken from the McKeon stock which was in the Shingle-Brown escrow, which they were escrow holders for.

THE COURT: Well, Mr. Carnahan, it seems to me still that this claim was made by Vincent & Company and it was satisfied in the manner that you state, and that is about all that Mr. Melvin could know about, it would seem to me.

MR. CARNAHAN: If I can ask him the question, if I have stated the facts as he understands it.

(Testimony of Bradford M. Melvin)

THE COURT: Wait a moment.

MR. CARNAHAN: That would be true. I just wanted to prove it.

Q BY THE COURT: Mr. Melvin, you understand, of course, what the offer is, what the question is?

A Yes, sir.

Q Can you throw any further light upon it? If you can do so, why, do so.

A I think that what Mr. Carnahan wants to bring up are some conversations which were had at which both Vincent and his attorney were present and either Shingle or Brown and myself.

Q All right.

A There were several such conversations.

THE COURT: You may recount them.

A The first one took place in my office, which was then in the Financial Center Building in San Francisco. Vincent and McInerny, and I think it was Brown and not Shingle, but I know one of them was there, and a great argument developed over this claim. At that conversation nothing very definite transpired. It was more of a dog fight than anything else. The next day or the day following that the same parties met in McInerny's office in the Mills Building, and on that day McInerny got pretty insistent that the matter be disposed of, and he threatened that if it were not disposed of either by paying cash or delivering the stock that they were demanding that he would bring some sort of a proceeding to have an injunction issued against this pool, this brokerage pool, which Mr. Carnahan referred to, which had been created at the instance of Italo in order to get money in fast enough

(Testimony of Fred Shingle)

to pay for these properties, and he knew that if an injunction was issued against that pool that it would cripple the whole situation and the stock would become worthless, and that was quite—

THE COURT: Is that what he said?

A Yes. Now I am saying that it was a very adequate threat to force the settlement. As the result of that threat the settlement finally arrived at was arrived at. There was one other conversation the day that the escrow was made in the Bank of America or Bank of Italy at Montgomery and California Streets, in San Francisco, but it was just the agreeing in words to what was set forth on the paper and giving the instructions to the bank.

FRED SHINGLE,

called as a witness in his own behalf, testified under oath as follows:

I am 46 years old, was born in Cheyenne, Wyoming, and have a wife and two daughters. From about 1919 to 1930 I was in the stock and bond business with Horace Brown, Rossiter Mikel and Axton F. Jones, doing business under the name of Shingle, Brown & Company. About ninety-five per cent of our business was the buying and selling of bonds, until 1926, when we joined the San Francisco Stock Exchange in San Francisco and commenced to do a general brokerage business. Prior to going into the stock and bond business under the name of Shingle, Brown & Company I had been in the bond business, having gone to work for E. H. Rollins & Sons in 1909, as office boy, and stayed with that firm until 1914, and then became city salesman for San Francisco, and

remained with Rollins & Sons until 1919. E. H. Rollins & Sons was one of the largest bond houses in the United States. I was employed for a time by the Savings Union Bank & Trust Company of San Francisco, in charge of their bond department, and was with them from 1914 to 1917. In 1918 I looked after the interests of my brother, Bob Shingle, and his associates in connection with the United Western Consolidated Oil Company, which was in charge of A. G. Wilkes. In connection with that enterprise I met the defendant Jack McKeon, who was at that time the head of the Head Drilling Company. I was with that company until the first of January, 1919, when I opened up a bond office for myself, and in August of that year Horace Brown and I formed the firm known as Shingle, Brown & Company, with which Axton Jones and Rossiter Mikel later became connected. Mr. Jones and myself were the salesmen for the concern, and Mr. Brown handled all of our detail work in connection with the investigation of the propositions that were submitted to us.

I met Mr. Wilkes in the spring of 1928 in connection with the Italo Petroleum Corporation of America. He came to my office with Mr. Vincent. I had not seen Mr. Wilkes for about ten years. He told me that he was back in the oil game and he was with the Italo Petroleum Corporation and had a good little company that he was very desirous of building up, that Vincent had been selling the stock of the company for a year or so, and he wanted to know if he couldn't interest Shingle, Brown & Company in the Italo picture. I told him that I doubted very much if we would be interested, but that I would

speak to Mr. Brown about it and suggested that he return later. At that time our company was not interested in any way in the promotion or development of any oil company, and we had never done any initial financing for any oil company.

In 1928 and the early part of 1929 was the peak of our business as regards the number of people employed by us and overhead and things like that. Everybody was working from very early morning until late at night, and we had about 80 to 85 employees.

Wilkes and Vincent returned a few days later, and Horace Brown and I had a conversation with them. That was the first time Horace Brown had ever met Vincent or Wilkes. Wilkes told us that he had just organized a company from the old company, through the exchange of stock, and he was very desirous of building up a real good company, and thought he had a very good foundation with Italo, that it was a very opportune time to purchase oil properties, and that they could be purchased at that time at an advantageous price. Vincent told us he had been selling stock for the Italo for the past year or two, mostly on the installment plan. The gist of the talk was that they wanted to know if we wouldn't join with them and help build up a real oil company. We told them that we had never done any initial oil financing, that we knew little or nothing about the oil business, that we had never sold any stocks on the installment plan, and that it was a type of business that we knew nothing about, and that we wouldn't be interested.

Wilkes and Vincent returned a few days later, at which time Horace Brown was present, and I think Wilkes said

(Testimony of Fred Shingle)

then that there were a couple of pieces of property they were very anxious to purchase at that time for the company. One was a producing property down on the Kern River Front and the other was some prospective lease down near Santa Maria, and they wanted to know if we would be interested in loaning them some money, that they would want between seventy-five and a hundred thousand dollars to pay off some obligations for these properties down on the Kern River Front. We discussed the proposition of making the loan and they said they would give security for it. Horace Brown asked them what security they would give and they said that they had a valuable lease down at Signal Hill, also a dehydrating plant that they represented to us had a value in excess of the amount of the loan. We asked them how and when the loan could be paid back, and they said the loan would be paid back through Vincent's sales, and he thought that he could pay it back within around about six months' time. Vincent told us if we would make the loan that it could be arranged for a like number of shares for each dollar we put up of this Brownmoor Oil Company stock as a bonus for the loan. He further stated to us that he had some options on some of this Brownmoor stock and that he expected to make a profit on the options, and that if he did he would give us a part of it.

We told them that we would think the matter over and let them know. A couple of days later Horace said to me that he had taken occasion to check up on the security which Wilkes and Vincent had offered, and said it looked adequate for a loan, and he suggested to me that we make the loan but not as Shingle-Brown but as individuals and

take some of our friends in with us. We advised Vincent and Wilkes that we would make the loan.

I phoned to Wilkes and Vincent and told Wilkes to go ahead with the plan, that we would dig up the money on the basis that we had talked to him about, and they had previously mentioned something about this permit from the Corporation Department, and I think we told him we would make it subject to Vincent being able to get the permit to sell more stock so the loan could be paid back. It was my understanding from what Vincent had told me that he would put up out of the Brownmoor stock sufficient stock so that we were to share for each dollar of the loan. The loan was finally agreed on $80,000. Vincent said that the bonus stock would be put up, that is, the 80,000 shares, that he would see that the 80,000 shares would be put up, but he didn't say whether it was his or whose stock it was. They said they were buying the assets of the Brownmoor Company, which was on the Kern front. Vincent had previously told us that he was about to get a permit to sell about 300,000 units of stock, and that if the permit wasn't granted there would be no money coming into the company to pay off the loan.

We were informed that the deal between the Brownmoor Company and the Italo Petroleum Corporation was an exchange of stock for assets.

With reference to the statement in Exhibit 142, the agreement between myself and the members of the $80,000 syndicate, we understood that the persons referred to as "Whereas, it is to the interests of certain individuals that said corporation obtain said loan," were Vincent and some of the people he had these options from. Ward Sullivan,

(Testimony of Fred Shingle)

attorney for the company, drew the syndicate agreement and it was passed on by our attorney, Mr. Elkas. The loan agreement is Exhibit 238, and provides for the loan of $80,000 to the company, payable in three, six, nine and twelve months, at 7 per cent interest, and the assignment of the leases of certain property as security, including the producing lease on Signal Hill and the dehydrating plant.

We proposed to make the loan individually and not as Single, Brown and Company, a corporation. We phoned some friends of ours that we knew and told them that we had a little flyer we were going in ourselves, and asked them if they wanted to come in. We did not solicit a subscription to the $80,000 from anybody who was connected with the Italo Petroleum Corporation or the Brownmoor Company. I subscribed $5000.00 as appears from Exhibit 142. Horace Brown's name is there. He made that subscription and subsequently transferred it to O. B. Wilkes, the wife of A. G. Wilkes. S. S. Langendorf subscribed $2500.00, Paul Nippert was a subscriber, Leo and George Whitney, who subscribed $2500.00, were all friends and clients of Shingle, Brown & Company. L. W. Dake was a stockholder in Shingle, Brown & Company; Charles Elkas, a subscriber, was one of our attorneys.

Several days after the subscriptions were started somebody from the Italo office, I think either Wilkes or Vincent, or both of them, wanted to know if some of their friends or associates could join the syndicate. We told them that was satisfactory to us. As a result of that conversation De Maria and Rollandelli made subscriptions,

as did Mrs. Donati, Mr. Tommasini, who I had not known before, and Mario Del Pero, who I later learned was a nephew of Paul Masoni, and Adam Bianchi and David Garvey. Vincent & Company made a subscription under the name of Henry Clausen, of $5,500. The subscription of $2500 each for Rossiter Mikel and Axton F. Jones bears the notation on the side, in Exhibit 142, "Paid—Perata," and was handled as follows: We had completed the entire subscription list of $80,000, and somebody, my recollection is, phoned from the Italo office and said that Mr. Perata wanted to come in the syndicate. The $80,000 was all subscribed, and as an accommodation Mr. Jones and Mr. Mikel gave up their subscriptions to Mr. Perata, who paid the $5000, as represented by Government's Exhibit 316, and that is the reason for the notation on the side, "Paid Perata." So that the Jones and Mikel subscription actually represented a subscription by Mr. Perata, paid for by him with this $5000 check in evidence, dated May 14, 1928.

A few days after we had communicated with Mr. Wilkes that we would make the loan he came into the office and said that one of those pieces of property down near Santa Maria was ready to be closed upon, and that he had talked to Vincent, who was willing to put up $5000 if we would advance $5000, and I asked him what security I could have for the $5000, and he said he would put the lease in my name. I told him I wouldn't consider that as security, and he said, "Well, Vincent has the 80,000 shares of Brownmoor over there, I will bring that over and put that up as security, and then when the $80,000 loan goes through you can keep that here and it

will be here for a bonus." I understood that this property that he referred to was an undeveloped lease. Vincent sent his check for $5000 over to us and we drew a check for a like amount. I considered the 80,000 shares as collateral security for the loan of both Vincent and myself, and received the original letter, of which a copy is here in evidence, from Mr. Wilkes relative to this loan and the 80,000 shares of stock.

The 80,000 shares of stock did not come from the Italo Petroleum Corporation at all, but came from Vincent.

We never had any stock salesmen, but only had floor men to attend to the customers as they came in, and our bond department salesmen. The 80,000 shares of Brownmoor stock which were sent to us were in four certificates of 20,000 shares each. We turned over the $80,000 to the Italo Petroleum Corporation and received their check for it, and in turning the money over to the company we turned over the same checks that we received from the syndicate subscribers. The loan was made about May 16th and was repaid in about a week.

I knew nothing about the Brownmoor deal with the Italo Company. A few days after the making of the loan Vincent phoned the office and said that the sales were very active, that the people were coming in buying the stock very rapidly, and that he was putting a lot of money into the company and he did not think the loan would be outstanding very long. He said that the reason for the rapidity of the sales was the announcement of the Brownmoor purchase. When the $80,000 loan was repaid we distributed the money and the stock when we received the stock. We kept the Brownmoor stock until we re-

ceived the Italo stock in lieu thereof. Although Exhibit 142 provides that we were to have 80,000 shares of Brownmoor stock, we knew nothing about the ratio of exchange of Italo Petroleum stock for Brownmoor stock, and the contract provided that we were to receive 80,000 shares of Brownmoor stock or 40,000 units of Italo stock. When I received that stock I distributed it to the subscribers of the syndicate in the proportion of their shares in the syndicate.

I have heretofore testified that Vincent told me that if we would go through with this thing and provide the money, that he would also cut us in for a share of the profits on some options that he had on the Brownmoor stock. I later heard from him with respect to this. On June 11th in our office Vincent came in and in the presence of Mr. Brown and myself he handed us a check for $83,000, and he said, "There you are, boys. I told you I would make you some money and here she is." I almost fell dead when I looked at the check, so I congratulated him and told him these options must have been a great deal more profitable than I had any idea they would be. Vincent then said, "Well, I am very glad to have you boys in the deal with us. I told you I would make you some money and I made it."

I did not know before that time the amount of Brownmoor stock that Vincent had under option, nor did I know the terms or the price at which he had it. The $83,000 check he brought in is in Government's Exhibit 149. The check for $24,750.00, part of Exhibit 149, was not brought in at the same time the $83,000 check was by Vincent. The first check for $83,000 brought in by

(Testimony of Fred Shingle)

Vincent was not made out to the Montgomery Investment Company, but was made out to Shingle-Brown. We told Vincent to make it out to the Montgomery Investment, which he did and sent it over later. My recollection is that the check for $24,750.00, part of EXHIBIT 149, was brought in later on June 11th by Mr. Wilkes. Wilkes gave us the check and said, "Just keep that here for a few days and I will advise you what to do."

The Montgomery Investment Company was a joint trading account of Shingle, Brown & Company, owned by Fred Shingle, Horace Brown, Axton F. Jones and Rossiter Mikel.

A couple of days after June 11, 1928, Mr. Wilkes brought in the check for $44,092.90, part of Exhibit 150, drawn by Frederic Vincent & Company, and told us to credit this check and the $24,000 check he had brought in previously to the account of David Garvey, and about that time he changed his personal account with us into the David Garvey account.

With reference to these certificates, Nos. 984, for 34,583 units, 985 for 195,417 units of stock of the Italo Petroleum Corporation of America, part of Exhibit 37, those certificates are endorsed by me, but I have no recollection of having placed that endorsement thereon. I did not own and never had any interest in either of those certificates or any part thereof, aggregating 230,000 units of stock, and numbered 984 and 985. I never held those shares of stock in trust for anybody else. It was the practice of our firm at that time to keep very careful record of stock that came in or went out of our office in which the firm or any member thereof had any interest.

(Testimony of Fred Shingle)

We have examined our records to ascertain whether there is any record of the receipt of this stock, and there is none. It is a common thing for brokers to put stock certificates in the names of other brokers as a matter of accommodation, and to get endorsements from them. If Frederic Vincent had presented or did present these certificates to me with the statement that he had had them placed in my name as a matter of accommodation, I would have endorsed them without question.

With reference to Exhibit 299, the chart purporting to show the realization from disposition of 600,000 shares of common and 600,000 shares of preferred stock of Italo Petroleum Corporation of America, I received the 2500 units of stock shown on that chart. Horace Brown did not receive the 1250 units of stock shown thereon as going to him, but that stock was received by O. B. Wilkes, the wife of A. G. Wilkes, who took over and paid for the $2500 subscription of Horace Brown. O. B. Wilkes paid the $2500 to the Italo Petroleum Corporation of America.

Axton F. Jones did not receive the 1250 units of stock as shown on Exhibit 299, and neither did Rossiter Mikel. The Jones and Mikel stock referred to on Exhibit 299 was delivered to John M. Perata, who took over the Jones and Mikel subscriptions as I have heretofore testified.

With reference to item No. 11 on Exhibit 299, 230,000 shares of common and 230,000 shares of preferred stock as going to Fred Shingle or Shingle, Brown & Company, the statement that we received that stock is false. We never had any interest in any of the 230,000 shares and never received them or any part of them. The 40,000

(Testimony of Fred Shingle)

units of the syndicate was issued in the names of the original subscribers to the $80,000 syndicate and was delivered to the subscribers, and with the exception of those certificates owing upon subscriptions that had been transferred to some one else, the stock was delivered to the syndicate subscribers.

That is, where the subscriptions were taken over by some one else, the stock was issued in the names of the original subscribers, delivered to them for endorsement, and after being endorsed by them was delivered to the persons who had paid for those subscriptions.

MR. CARNAHAN: It will almost immediately, with reference to the paragraphs of the indictment which relate to the making of the contract between the Italo Petroleum Corporation of America and the McKeon Drilling Company, which is charged as one of the parts of the scheme, to the paragraph of the indictment which charges that some of the defendants were then and there officers of the Italo Petroleum Corporation—(reading extracts from the indictment).

Now, as I understand this indictment itself and these charges to which I have referred, I cannot construe it in any way except as charging, as making a charge that some of the defendants who were then and there officers of said Italo Petroleum Corporation of America were the ones who were the participants in those particular parts of the scheme to defraud. It has been clearly established who the officers and directors of the Italo Petroleum Corporation were during this period of time, and it has clearly appeared that neither Fred Shingle nor Horace Brown

(Testimony of Fred Shingle)

nor Axton Jones were officers or directors of the Italo Petroleum Corporation at that time, and therefore it seems to me that taking the indictment itself there is no charge in the indictment that these three gentlemen or any of them participated in these parts—in this part or these parts, rather, I should say, of the scheme; that is to say, they are not charged with having any secret agreement or arrangement with the McKeon Drilling Company whereby it should receive only 2,000,000 shares of stock, and that other people should receive 2,500,000 as secret profits. They are not charged with that. They are not charged with having gotten this permit and representing that they were paying 4,500,000 shares, when as a matter of fact the indictment alleges that they were getting only 2,000,000 shares. In other words, neither Shingle nor Brown nor Jones are alleged in the indictment with having any part or having participated or being chargeable with these particular parts of the scheme to defraud, which generally is alleged in the entire indictment. The matter has been presented, your Honor, once or twice, in different fashions, that is, by motions to exclude the evidence and by objections. It seems to me that I cannot safely proceed with this witness unless I ask your Honor for a ruling upon that question at this time, because I don't want to have some court say at some time that I am waiving or consenting to any different interpretation of this indictment than the interpretation which I have just stated to your Honor. And I would like to ask your Honor for a ruling on that matter at this time, so that I may not be prejudiced by having it said some time later that I waived my right to insist upon that.

(Testimony of Fred Shingle)

THE COURT: Well, what question do you present to the court?

MR. CARNAHAN: The question I present is whether your Honor interprets this indictment, whether we are charged with participating in these particular parts of the scheme. The point is that if we are not charged, it is useless for me to present a defense on behalf of these gentlemen to that. If your Honor rules that we are charged with having participated in these parts of the scheme, then I want, of course, the chance to present the evidence to show what the facts were with respect to that. That is the point I am making.

THE COURT: Have you any observation to make, Mr. Redwine?

MR. REDWINE: Yes, your Honor. I think that under the conspiracy count of the indictment, under the rule that anybody who aids, abets, or assists in the consummation of any offense, that they are liable as a principal, and from the construction of the indictment itself, these defendants are put upon the burden of meeting the Government's proof relative to their participation in this particular phase of the scheme.

THE COURT: Well, you mean that although the position of counsel may be correct—

MR. REDWINE: I am not conceding his—

THE COURT: —that they are not charged with having participated in this part of the scheme with reference to the McKeon Drilling Company's stock, nevertheless, they might be convicted if they aided or assisted? Your view is that although they may not be, although

(Testimony of Fred Shingle)

the indictment may say that the execution of the scheme was confined to persons other than the defendants mentioned, nevertheless, the whole evidence might show that they aided and assisted?

MR. REDWINE: Yes, your Honor, and the indictment charges that they were a part of the persons that schemed that this should go about, we state in the indictment that all of the persons entered into the conspiracy at one time or another, and that all of the persons entered into the scheme.

MR. CARNAHAN: I am not talking about the bill of particulars at all now. I am talking about the indictment itself, which the bill of particulars, of course, cannot change in any way except if it has any effect in changing it it is a limitation. The Government can not by bill of particulars enlarge the charge in the indictment. I am standing on the language of the indictment itself. The answer to Mr. Redwine's suggestions, if your Honor wants it, is this: He says that we are charged with participating in a scheme. They have got a scheme here with a great many different parts in it, alleged parts in it. He says that we are charged with a conspiracy. However, the conspiracy charge refers back to these very paragraphs that I am talking about in the indictment itself, which charges that certain defendants had taken part in certain parts of the scheme and were not charged with having taken part in these parts of the scheme, and that is in the indictment itself and without regard to the bill of particulars at all.

THE COURT: Well, now, resuming what I said, there is an uncertainty, then, I will say, in your mind as

(Testimony of Fred Shingle)

to how far the indictment, the language of the indictment implicates these certain defendants in certain portions of the thing—well, I will withdraw the statement that there is an uncertainty. There is no uncertainty, of course.

MR. CARNAHAN: Yes, your Honor, I claim it is clear.

I say this with the greatest respect to your Honor: My only ambiguity is that I don't know what instruction your Honor is going to give the jury with respect to it.

THE COURT: Well, that ambiguity may not be plain to the mind of counsel, of course, very obviously. No, I think clearly that that is the situation that you present. The Court will decline, so that you can have an exception on that, Mr. Carnahan, and will decline to pass upon the question presented, if a question is presented at this time.

MR. CARNAHAN: Then may I have an exception?

THE COURT: Yes.

MR. CARNAHAN: And then also may I make this statement, reserving all rights that we may have and not waiving any rights that we have under the indictment, that we are not charged with the participation in the parts of the scheme to which I refer, I desire to proceed to examine this witness further.

THE COURT: And that the court expressly declines to pass upon the question presented.

MR. CARNAHAN: Yes.

THE COURT: Very well.

MR. CARNAHAN: And as Mr. Simpson says, without waiving any of the objections which we have made before.

THE COURT: Very well.

(Testimony of Fred Shingle)

A Neither Horace Brown, Axton Jones, Rossiter Mikel nor myself was ever a director or officer of the Italo-American or Italo Petroleum Corporation or the Brownmoor corporation, or of any of the other corporations which have been mentioned here, except Shingle, Brown & Company.

I knew nothing at any time of any connection or transaction of Siens, Westbrook, Shores, Mrs. Crooper, Cragen, or any one else with the Brownmoor Oil Company, and never heard of any of those transactions.

With reference to Exhibit 145, the letter dated June 14th, addressed to Frederic Vincent & Company, I wrote that letter, and prepared the form letter attached thereto.

I received back the form letter, part of Exhibit 145, in which Vincent & Company offered $1.75 per unit for the syndicate stock, and I advised the syndicate members of the receipt of that offer. I had had several talks with Wilkes concerning the new syndicate and presume that I had one on June 13th as mentioned in this letter.

When I refer to the new syndicate I mean this: Upon the completion of the first Brownmoor syndicate Wilkes and Vincent were very anxious to purchase some more properties which they had under consideration, and were very anxious for our firm to get another syndicate. We of necessity had several talks of the different properties that they were considering, the amount that they would have to pay for them. The reason why the syndicate was necessary was because in all of those purchases they would have to give part cash and part stock. For instance, if they needed a million dollars to buy a certain property,

(Testimony of Fred Shingle)

they would have to have two hundred fifty thousand in cash, and it was in respect to the raising of the cash that they were interested in having us form another syndicate. We agreed finally to take the responsibility of managing the syndicate, but no responsibility in raising the money. We had several conversations with Wilkes and Vincent and several with Wilkes alone concerning the raising of the money. I believe that Horace Brown was present at most of these conferences. We had meetings where we discussed the various properties and the amount that would have to be paid for them, and things like that. In those conversations Vincent said that he could sell stock fast enough to pay for the properties, that his stock sales were going so well, that he had done so well with the Brownmoor stock, that 600,000 units, and so much with the 300,000 units he had just previously handled, that it was his idea that over a period of probably six months or a year, by increasing his sales force, which he intended to do right away, and one thing or another, he could handle almost any amount of stock that the syndicate would take hold of, because there was a serious thing to find out who was going to sell the stock, because part of the money would have to be moved out, raised through the sale of stock. The first list of properties that Wilkes showed us required a syndicate to take about ten million shares of stock. Out of the proceeds of the sale of that stock, part of it would have to be put up in cash eventually as the stock was sold and the other part would be exchanged for the properties purchased. The company could exchange directly a certain number of shares in exchange for certain properties.

(Testimony of Fred Shingle)

In addition to that they would have to sell so many shares to get the money necessary to make the cash payments of money that would be required for the property. Prior to the sale of the stock the money would have to be raised immediately through the syndicate. The main properties on the first syndicate under consideration were the McKeon Drilling Company, the Gilmore Oil Company, the L. T. Edwards property, the Premier, Section 7, Penn Coalinga and a few more like that. Those properties were substantially the same properties that were subsequently taken in with the exception that the Edwards and Gilmore properties were left out and the Graham-Loftus and a couple of other small companies were taken in. That necessitated the differential between the ten million share syndicate and the twelve million shares that were issued in the final syndicate arrangement. I eventually agreed to be syndicate manager for the syndicate. The original syndicate agreement was prepared in June and called for ten million shares of stock, the syndicate agreement being in evidence. As syndicate manager I was to receive two and a half per cent of the profits of the syndicate, not exceeding in any event $50,000, and I was to receive no other compensation in any way for acting as manager of the syndicate except what should be made out of the profits. It was just a gamble. The same is true with respect to the later syndicate. The syndicate agreement authorized me as syndicate manager to advance for the purchase of properties up to $500,000 out of the syndicate funds that were subscribed, and prior to the subscription of $1,000,000 and on account of the purchase of the properties. We advanced syndicate funds on account of the

(Testimony of Fred Shingle)

purchase of the properties before we had the $1,000,000 subscribed and before they had the permit authorizing the issuance of stock. The transaction between the company and myself as syndicate manager with respect thereto was in the nature of a loan from me to the company, repayable with six or seven per cent interest. If the big deal had not gone through the only thing that would have happened would have been that we would have got our money back plus interest.

In accordance with the original syndicate agreement we obtained subscriptions thereto and used the money subscribed to make advances to the company for the purchase of property.

With respect to the $24,750 and the $44,092.90 in the account of David Garvey, I received instructions from Mr. Wilkes relative thereto. He instructed me to place $50,000 of the amount in the Garvey account into the big syndicate, and he also told me that a subscription of $25,000 was to be made in the name of Mr. Perata, and $25,000 in the name of Mr. Masoni. Those instructions were verbal. We gave Masoni and Perata each credit for $25,000 as the result of those instructions, the credit being in the syndicate. That money, together with other money that we had received, was partially disposed of as shown on Exhibit 227, that exhibit being a memorandum dictated by me June 19, 1928, showing that I had received certain checks in the syndicate, including a check for $40,000 charge against the Montgomery Investment Company, the same being the subscription of David Garvey, and $10,000 from Shingle, Brown & Company, the same being charged to the Montgomery Investment Company

for the account of David Garvey, and that the total of the checks received, amounting to $225,675 had been deposited with Mr. Skinner of the Bank of Italy to be wired to that bank's office in Los Angeles or Long Beach for the account of the Italo Petroleum Corporation, and to be used for the purchase of the property. I sent the money as described in this exhibit.

After the $50,000 had been transferred from the Garvey account and credited by me at Mr. Wilkes' instructions, $25,000 to Perata and $25,000 to Masoni, I received a payment in July from Masoni of $7,000, which with a credit he had of $18,000 on Shingle-Brown's books aggregated a $25,000 subscription by Masoni to the big syndicate. These are the syndicate receipts of Masoni, dated June 30, 1928, for $25,000, subscription to the big syndicate. About the middle of July Mr. Wilkes told me that Masoni was going to put $25,000 into the syndicate directly, and that the $25,000 which he had ordered put in about a month before would be taken out because Masoni had some arrangement with Vincent and had taken stock instead of a syndicate subscription, so that Wilkes would take this $25,000 out, which he had previously ordered put in Masoni's name so he could make his settlement with Vincent, and I thereupon returned the $25,000 to Wilkes, that being the $7000 check received from Masoni and the $18,000 credit he had with Shingle, Brown & Company.

The statement on Exhibit 299 of a double payment or credit to Masoni is incorrect.

When Wilkes began to talk to us about this big syndicate, to tell us about the different properties, I knew nothing about them until he got down to the name of the

(Testimony of Fred Shingle)

McKeon Drilling Company; I had known Mr. John McKeon for a great many years and thought a great deal of him as an oil man. I went to Los Angeles and had a talk with Mr. McKeon to find out if Wilkes was really on the right track in his statement to me that he was buying these properties or had an opportunity to buy them at what he considered a very cheap price. Jack McKeon was in the Richfield Oil Company at that time, and he told me that Mr. Wilkes was on the right track, that in his opinion there never was a better opportunity to buy oil properties than there was at that time, and that it would have to be bought with some cash down-payment. He told me he didn't care much about the refining end of the business, but he was very enthsuiastic over the production end, and that it had a great future. I went over the proposed program with him generally, and mentioned to him the various properties that Mr. Wilkes had told us he contemplated purchasing, and a rough draft of the prices that Wilkes figured he would have to pay for the properties, and Jack McKeon said he thought the prices were very cheap. He also said that practically all of those properties would have a good future because they had plenty of extra space to drill on.

With reference to the appraised value of the properties, we were told about what they would run, and we later saw the actual appraisements. Computations were made as to the price which the proposed transfers would reflect for the stock of the Italo Petroleum that would be issued. There was considerable discussion on that between Brown, myself and Wilkes. We were trying to arrive at a fair price which the company should get, and also a fair price

which the syndicate should give. The only basis we had to go by was the last sale of stock which the company had made practically a month previously to Vincent & Company, whereby they had a contract, but not a commitment, to purchase Italo units at $1.50 a unit, less 15 per cent, which would mean $1.27½ net to the company. Wilkes was quite anxious to have the syndicate pay as close to that price as possible. Brown and myself, on the other hand, took this position: that inasmuch as the company was getting these properties at a cheap price according to his statement, that the syndicate on the other hand should have some advantage of that purchase also, and as I remember I think we started out at around $1.00 per unit that the syndicate could pay for the stock, for the reason that the syndicate would be buying 3,000,000 units of stock which would be paid for over comparatively a short period of time, whereas Vincent was paying $1.27½, and he could come in and buy one unit at a time or not buy any. After several discussions we arrived at a price of $1.16-2/3 per unit, which we considered fair to the syndicate, and Wilkes considered fair for the company.

The original syndicate agreement was revised in July, 1928, for the reason that between the date of the first syndicate, which was June 19th, and the real syndicate, which was July 12th, the Edwards' properties were eliminated and the Graham-Loftus properties put in in lieu thereof, and the Graham-Loftus properties were costing considerably more money. Mr. McKeon at that time was more anxious to have the Graham-Loftus properties in than he was the Edwards properties. At that time we

(Testimony of Fred Shingle)

understood that the price for the Graham-Loftus properties was $3,500,000 cash, and as the result of a week or ten days negotiations on the part of Wilkes the price was ultimately fixed at $3,000,000 cash. That was all in money. Neither myself nor any members of the firm of Shingle, Brown & Company had anything whatsoever to do with the negotiations for any of the properties purchased by the Italo Petroleum Corporation of America.

In addition to the $225,000 that the syndicate advanced on the purchase of properties account in June, 1928, they advanced in the neighborhood of $350,000 addition prior to the granting of the permit August 9, 1928. It is my recollection that we had paid into the syndicate about six or seven hundred thousand dollars at that time. At the time the permit was granted we actually had commitments on syndicate subscriptions for about $900,000.

With respect to the commitments on property purchases I mean this: The syndicate, in order to eventually acquire all of these properties which the company had under option at that time, and for which a certain amount of stock and a certain amount of money were to be paid, required that the syndicate pay on those properties in cash around $3,500,000. The permit provided for the issuance of 12,000,000 shares of stock to Maurice Myers, Trustee, of which 7,500,000 were common shares and 4,500,000 preferred shares. The syndicate was to receive 3,000,000 shares of preferred and 3,000,000 shares of common, for which they were to pay into the company in cash a sum around $3,500,000. That is, the commitment for properties that the company was to acquire called for

cash payments of something between $3,400,000 and $3,500,000 in cash, and also called for the exchange of a certain amount of stock, which was approximately 6,000,000 shares, divided into approximately 4,500,000 shares of common stock and 1,500,000 shares of preferred stock. The company was proposing to take over these properties subject to obligations which amounted to approximately $2,750,000. Ultimately the syndicate agreement operated this way: 12,000,000 shares of stock issued under the permit were issued to Maurice Myers as Trustee; he turned over to Shingle, Brown & Company as escrow holders 3,000,000 shares of common and 3,000,000 shares of preferred stock, to be delivered to me as syndicate manager, when, if and as I paid for it.

After the permit was issued and the contracts in evidence signed, I made a contract with Mr. Vincent respecting the sale of the syndicate stock. That contract is in evidence. It required Vincent to sell 500,000 units of stock at a price of $1.60 net to the syndicate. At about that time I went to New York in an effort to arrange for the sale of additional syndicate stock, and also to see if the stock could be put on the New York Curb Exchange. Wilkes went back on the same trip with me. At that time I had a verbal agreement with Vincent that while he was working on these options we wouldn't give anybody else an option on the stock in California. Where the agreement provides that Vincent is to sell 300,000 units of stock on or before September 15, 1928, that requirement was inserted because of payments falling due on property shortly after September 15th. I had in mind

particularly the Graham-Loftus payment falling due about September 15, 1928, when I put that proviso in the agreement. The time for payment on the McKeon contract had been extended. We made arrangements in New York for the sale of stock but later cancelled those.

I returned from New York about the 10th or 15th of September, and Mr. Brown reported to me that the company had a payment due on the Graham-Loftus properties of something in the neighborhood of $600,000 in principal and another $50,000 or $60,000 in interest. The syndicate had already paid on the Graham-Loftus properties around $300,000 or $350,000. If that second payment wasn't made the syndicate and the company would have lost the $350,000 they had put in towards the purchase price of the Graham-Loftus properties, because the Graham-Loftus people had a right to forfeit under the contract. That is why we depended on Vincent and had that proviso embodied in the contract with him. He had assured us that he would raise the big bulk of the money prior to September 20th, when that Graham-Loftus payment was due.

We did not have the money in the syndicate to make that payment, because the syndicate money had been paid out on other properties. Up to that time the syndicate had paid out in the neighborhood of a million and a half or a million and a quarter in cash on the various properties. In that predicament Mr. Brown went to Los Angeles and talked the matter over with Jack McKeon and found that Jack was just as much worried as we were about it. Jack said he would take his coat off and see

what could be done. He went to the Farmers & Merchants Bank and arranged a loan of $300,000. We gave as security for that 2,000,000 shares. I mean the bank required as security for that in addition to Mr. McKeon's endorsement on the note 2,000,000 shares of syndicate stock as collateral. We told McKeon that it was doubtful in our minds if we had the right to put that stock up as collateral, and he said that he would indemnify us and give us a letter to that effect, if there was any loss that he would make it good out of his own stock.

In addition to that, William Lacy, who had $100,000 in the syndicate and had got a lot of his friends in the syndicate, went to the Farmers & Merchants Bank and borrowed $300,000, as I understand putting up his own collateral for that, and that $300,000 together with the other $300,000 got us over the hump so that we could make that Graham-Loftus payment.

Another thing that was very serious was that the day that the Graham-Loftus payment became due they brought in a tremendous well, and there was every reason in the world to think that they would be very glad to have us not make that second payment, because that made the property very, very much more valuable right away.

This note, Exhibit DD, signed Fred Shingle, Syndicate Manager, payable to Farmers & Merchants National Bank of Los Angeles for $300,000, dated September 20, 1928, is the note which I gave to the bank at that time. These agreements, Exhibit EE, are the loan agreements and the collateral agreements for the collateral posted with the bank for the loan. Exhibit FF, signed Italo Petroleum

(Testimony of Fred Shingle)

Corporation of America, by Alfred G. Wilkes, Vice-President, Paul Masoni, Secretary, and also by F. V. Gordon and John McKeon, addressed to Shingle, Brown & Company, dated September 20, 1928, is the indemnity agreement which I required at that time for signing this note and putting up that stock.

Exhibit FF is in substance as follows:

Dated September 20, 1928, addressed to Fred Shingle, stating that Italo Petroleum Corporation of America, A. G. Wilkes, Paul Masoni, Fred V. Gordon and John McKeon individually and collectively hold Fred Shingle not responsible for the payment of the $300,000 note executed by him as Syndicate Manager to the Farmers and Merchants National Bank and endorsed by them.

Exhibit GG, dated September 20, 1928, addressed to myself and signed by F. V. Gordon, was received by me at the same time and in connection with the execution of the promissory note and the other papers to which I have just referred. Exhibit GG is in substance as follows:

Dated September 20, 1928 is to Fred Shingle from F. V. Gordon stating that the 1,000,000 units of stock deposited as collateral for the $300,000 note of the Farmers and Merchants Bank to be used for that purpose as a guarantee of the note signed by Gordon and John McKeon, and that an additional million units was to be deposited as collateral for the second $300,000 note.

The Graham-Loftus stock was in escrow with the Bank in Los Angeles, and the contract between the Italo Com-

pany and the Graham-Lostus Company, Exhibit HH, called for the payment of $166,666.00 per month. The $300,000 note was subsequently paid and the stock put up by the syndicate as collateral for the note was subsequently returned to the syndicate.

Subsequently I had several talks with Wilkes regarding Vincent's failure to sell the stock as required by the agreement and pay the money into the syndicate, and Wilkes told me that he had proof that Vincent was not turning over the money that he had already received from his sales of stock. Wilkes also told us that we would have to get in to save the situation. First he wanted us to get in and actually investigate the properties, and he told us all about them again. At that time we had an earnings statement out and the management was good, so Mr. Wilkes wanted to know if we would not get in and try to save this whole situation, and the only way we knew how to do it would be to cancel Vincent's contract and form a brokers' pool and make it simply a stock market proposition. By a stock market operation I mean through the sale of stock on the stock exchange. By a stock market operation I mean this: that Vincent up to this time had been what we call in our business peddling stock from having 40, 50 or 100 salesmen out and selling to widows and orphans and what not, around like that. A stock market operation is where you sell stock through the medium of the stock exchange. You don't know who buys the stock. It is a demand which comes daily on the stock exchange for that stock. We were not proposing to create a swelled or false market price for the stock. We

(Testimony of Fred Shingle)

did not propose to sell the stock directly to the public but only through the stock exchange, and through stock exchange members. The stock at that time was listed on the San Francisco and Los Angeles Curb Exchanges. We also had a talk with Jack McKeon about that time. He was very much exercised and said that something had to be done in order to save the whole situation and he urged us and wanted to know if we could not get in and get some of our local firms to really investigate the company and form a pool, and he said that if we would do that he would see that we were compensated. We told him that we would go ahead with this on condition that he would head the company. He told us that he would eventually do so, but he was under contract with the Richfield Oil Company, and it would be impossible for him to take active charge until the first of the year.

Prior to that time Wilkes told us that if we would get into the matter he would see that we would be compensated, so that we had that assurance from both John McKeon and Wilkes. Before we agreed to do that we took the matter up with several brokers in San Francisco, the ones that finally joined us being the firms of Plunkett, Lilienthal & Company, Geary, Meggs & Company, and also the firm of Graham-Atkinson in Los Angeles, which was recommended to us by Mr. Gordon of the Farmers & Merchants Bank. The San Francisco brokers made an investigation in San Francisco of the company and things of that sort, and in the early part of October a representative from Plunkett, Lilienthal & Company, a representative from Geary, Meggs & Company, and myself came to Los Angeles for the purpose of talking with

(Testimony of Fred Shingle)

Mr. McKeon. We met a representative of the Graham-Atkinson Company, and the group of us had a talk with Mr. Jack McKeon about the general affairs and conditions of the company. One of the conditions that the brokers made before agreeing to go into the deal was that Jack McKeon head the company. He said it was impossible for him to do so at that time, but he gave us his promise that as soon as he could disconnect himself from the the Richfield Oil Company he would do so, because his heart was in this combination and he was going to devote his time exclusively to that, but in the meantime he would get a very good oil man to head the company, and he suggested or asked us if we would be satisfied with William Lacy of Los Angeles. We did not know Mr. Lacy, but we made a check on him and found that he was a man of very high standing here in Los Angeles, so he was satisfactory to us. We found that Mr. Lacy had been the president of the Chamber of Commerce here and the head of the Community Chest and the head of the Lacy Manufacturing Company, and all of our reports were excellent. He was also connected as a director with the Farmers & Merchants Bank.

Jack McKeon told us that he would consult with Mr. Lacy, that Mr. Lacy was quite familiar with all the properties, and he had loaned this money to the company, and he also had $100,000 in the syndicate, and Jack reported to us that he had had a talk with Mr. Lacy and that Mr. Lacy would be very happy to take the presidency of the company. Mr. Lacy, as a condition to becoming president of the company, required that he have an option on some stock and also, because he did not want to

(Testimony of Fred Shingle)

carry the whole load alone, wanted to have the right to put on some of his close associates from the Bank on the board of directors. Lacy put on the board of directors Hugh Stewart, Mr. Chapin, Fred Keeler and Mr. McLachlen. As a result of Mr. Lacy's requirement that he be given an option on some stock, I gave him an option on 100,000 shares of common stock at a price of $1.00 per share. With this set-up of Lacy as president and these other gentlemen as directors, we formed this brokers' pool and undertook the sale of the stock. The members of the pool were Plunkett, Lilienthal & Company, Geary, Meggs & Company, Graham, Atkinson & Company and Shingle, Brown & Company. The other members of the pool would not have joined the pool unless we went into it. They looked to us for the handling of everything, and we were equally interested in the pool with them.

We gave the pool members an option on 2,500,000 shares of common stock at various prices. As I remember, it was $1.05 for the first 500,000 shares, $1.10 for the second 500,000 shares, $1.15 for the third, and $1.20 and $1.25, a 5-cent step-up to the syndicate on each 500,000 shares. The pool members would not associate with Frederic Vincent and did not want him to have anything to do with it. They required that his contract should be cancelled, and I cancelled it.

Prior to making my commitment to the brokers' pool I inquired of Vincent as to the number of shares that he had sold that he had not reported or taken up. We asked for his position and told him that we were going to cancel his contract for non-performance, and that we wanted

to know his position and wanted to be fair with him. By knowing his position, I mean that we wanted to know the number of shares of stock that he had sold and not delivered or had not called on me for. Vincent told us that he would want 120,000 units, or around there.

In giving the options to the brokers I saved out the 100,000 shares which I had optioned to Lacy and the 120,000 which Vincent said he would require. At that time there were several other options outstanding that I had given, and the options to Lacy, to the New York group, to the brokers' pool, and the 120,000 shares which Vincent reported to us that he needed took up substantially all of the common stock which I had available. This whole matter took place about the 16th of October, 1928. After that time Vincent reported to me that he had actually sold more stock than he had reported. He came in and said he had made a mistake, that instead of being only 120,000 units short he was about 400,000 units short, and demanded that we take care of him. His demand was more of a threat. He told us at that time, when we asked him why he had not told us his correct position, that he had only given us his direct sales position, that is, the stock he sold for cash, and he had neglected to tell us about his partial payments, and finally he put the matter in the hands of his attorney and threatened an injunction to enjoin the syndicate from selling any more stock. It was my opinion at that time that the filing of a suit would be very detrimental, because the company had entered into these contracts to make these cash payments. We had no one but the syndicate to rely on for the cash to make the payments. Vincent was one of the main insti-

gators of getting the syndicate started and he was double-crossing us, and a temporary injunction preventing us from furnishing the stock from the syndicate to buy these properties would have been very serious.

In our investigation in Los Angeles by the brokers in connection with the formation of the brokers' pool, we found that stock had been sold by a concern called the International Securities Company, Mr. Bentley, and that the stock had not been delivered to the purchasers, so we finally formed an escrow so that if anybody did pay any money for their stock they would be sure to get the stock. That matter was arranged and handled by Mr. Brown.

As a result of the discovery of these sales the brokers demanded that the McKeon stock be escrowed so that it could not be sold on the market, with the result that Shingle, Brown & Company were appointed escrow holders of the McKeon stock. That stock was actually delivered to us as escrow holders.

The sales of stock through the brokers' pool were very successful in providing the moneys necessary for the purchase of the property, so that we were able to make payments for the properties out of the moneys that had been subscribed, plus the money that we received from the stock sales within a period of not to exceed two months from October 15, 1928.

As a result of the demands or threats of Vincent, we went to McKeon, who knew the story, and talked it over with him, and the matter was so serious that we had to meet Vincent's demands although we knew exactly what he was trying to do. We undertook to provide the stock

for him. We did not have the stock to furnish to him out of the syndicate other than the first 120,000 units we had saved out. In my opinion Vincent had only one object in view. We knew definitely at that time that Vincent had failed us and the company in putting up the money needed in the middle of September for the $600,000 that was due Graham-Loftus. We found out definitely that he had already sold and had been paid for about $400,000 worth of stock which he had not delivered. If he could bring an injunction suit against the syndicate so that we would fail for everything that had gone before, that would make the company and the syndicate, instead of having to pay the syndicate $1.60 a unit for the stock, he would have been able to pick it up for about ten cents a unit. I don't think there is any doubt but that was Vincent's purpose.

We made arrangements with Jack McKeon to supply Vincent & Company's customers to whom he was committed. Jack McKeon agreed to provide the stock necessary to do that out of the McKeon stock held in escrow with Shingle, Brown & Company. The stock was provided from the McKeon escrow with Shingle, Brown & Company. As a result of these transactions the escrow was made with the Bank of Italy, whereby Vincent & Company were required to furnish the names of their subscribers and the amount due to each subscriber. We delivered the stock to the bank and the bank delivered the stock to the subscribers instead of to Vincent, because we didn't trust Vincent.

By December 20, 1928, our receipts from stock sales plus the amounts of money for subscriptions into the syn-

(Testimony of Fred Shingle)

dicate were sufficient to pay for the properties, and we had completed those payments and had an accounting with the company and with Maurice C. Myers, the trustee of the stock. This instrument dated December 20, 1928, signed Italo Petroleum Corporation of America by A. G. Wilkes, Vice-President, and Maurice C. Myers, Trustee, reciting that we have complied with all our obligations as syndicate manager and as escrow holder, is a release of our obligation under the agreements, which are in evidence as Exhibits 83 and 84. These documents ended our transaction so far as the company was concerned, and the trustee, in respect to this syndicate and this escrow. We also received this release from Frederic Vincent & Company, which is Defendant's Exhibit JJ.

Subsequent to the execution of these releases and the closing up of this transaction, Shingle, Brown & Company received instructions from the McKeon Drilling Company respecting the disposal of the McKeon Drilling Company stock that we were holding in escrow. Horace Brown handled those matters. I am not familiar with the details of those matters. I do remember that subsequently we received the proceeds or part of the proceeds of sale of some of the McKeon stock. We received 25 per cent of the proceeds from the sale of the McKeon stock that was put up in escrow with the Bank of Italy to fill the Vincent order. I believe that amounted to around $21,000. We were told by Wilkes and McKeon why we shared in those proceeds.

Prior to that time we talked with Wilkes and McKeon concerning the reorganization of the company and the

acquiring of other properties and companies in addition to the property that had been acquired during the summer and fall of 1928. Along in the latter part of October or the early part of November we first heard of Mr. John McKeon's plan for a larger oil company. I was told that when Wilkes was in the East in the latter part of August or the first part of September he had been working with eastern bankers at that time making plans for the formation of a larger company, with the idea of continuing to buy some properties. This is the first time that we learned of this matter, and in November a representative of the eastern brokers came out to San Francisco and they wanted to know if we would meet him and if the figures were all right on this new deal if we would join with the eastern brokers in helping out on the deal, so we asked them what the tentative plans were, and it was to be a bond finance, and then a stock finance, and we told them we would be very much interested in carrying our share of the bonds.

The deal as they had it lined up at that time would take about $10,000,000 of bonds and I don't recall what was said about the stock, although there was considerable stock in addition to that. The entire deal, that is, the amount of all the properties involved, would run about $30,000,000. Wilkes mentioned the acquisition of the properties of the Wilshire Oil Company, the Delaney properties and several others. He said that the eastern houses were willing to take it up if it was big enough. Subsequently I met Mr. De Shadney, representing the eastern people. I met him in San Francisco in November, and Mr. Brown had some talks with him later on that month in Los An-

(Testimony of Fred Shingle)

geles. Mr. De Shadney said the bond issue would run around $10,000,000 and that we would be expected to take around half of the bond issue, or $5,000,000 in bonds. They told us, but we knew that anyway, that any eastern house would very seldom or never finance a western bond issue without having western sponsors or western brokers interested with them. We had a discussion with them relative to the $5,000,000 in bonds that we were expected to take, and we were told very frankly that this was an eastern deal but we could be in on the bonds, and they wanted us to be in on the bonds, but as far as the stock was concerned, that that was to be handled all to themselves. We knew what it meant, that is, that they had a stock bonus and didn't want to give us any part of it.

With respect to Exhibit 280, showing the subscribers to the big syndicate, the total amount of money shown on there of $1,911,375.00 was paid into the company for the purchase of properties.

Exhibit 110 was brought up to San Francisco by Mr. Brown with several other letters of distribution.

With respect to the last paragraph of Exhibit 11, authorizing the delivery to me of the balance of the McKeon Drilling Company's stock held in escrow by Shingle, Brown & Company, amounting to 961,510 shares of common stock, Mr. Brown told me that he had had a talk with Mr. Wilkes, and that Wilkes told him that he had a large block of McKeon escrowed Italo stock which McKeon had given him instructions to distribute more or less at his disposal to help out this big deal. After Brown delivered this letter to me I had a conversation with

(Testimony of Fred Shingle)

Wilkes, in which I asked him about the stock, and he gave me further instructions as to what to do with it, namely, that we were to keep half of that 961,000 for ourselves and distribute the other half to himself or to his order after taking out for further distribution that he was still to make. He told me that the McKeons had some time previous to that told him to use a large block of this stock in furtherance of the big deal and to more or less use his best judgment where he thought it would do the most good for the big deal. This was in connection with what the brokers' pool had done in putting across the deal, plus our commitment for the $5,000,000 of bonds. Wilkes was very appreciative of what we had done and what he would expect us to do in the future. With respect to the proposed eastern deal, he told us at that time that negotiations were getting very close for that big deal, and that he expected a representative of Palmer & Company would be out soon after the first of the year, and negotiations would be probably closed at that time.

These letters, part of Exhibit 110, dated December 24, 1928, refer to this understanding between Wilkes and ourselves, concerning which I have just testified.

It was my understanding at that time that the properties that they were proposing to *to* acquire had value of from twenty-five to thirty million dollars. Our firm was not in a financial position at that time to take and carry one-half of the $10,000,000 bond issue. It was necessary for us to get our bank credit in shape. After we made our commitment to take $5,000,000 of bonds, which we expected would be delivered to us, we began

(Testimony of Fred Shingle)

about the first of the year 1929 to get ourselves in a financial condition to make good on our promises which we had made to everybody, so we proceeded in the early part of January to rather gradually and slowly sell this stock which we were to get from the McKeons, and which we did get from the McKeons, to put ourselves in that position. At that time the option with the brokers' pool was still in force. We started to dispose of this stock that we received from the McKeons at the market price. The market price at that time was lower than the price that the brokers were required to pay for the stock under their option and we were not at that time able to sell any of the syndicate stock on the market at the price which the brokers had under their option. We kept in touch with Mr. Wilkes as to the progress of the negotiations with the big deal, as it went on in the east. Mr. Lyons, a representative of Palmer & Company, the New York brokers, and Mr. De Shadney came to California, and we met them in Los Angeles. Lyons told us at that time that the firm of O'Melveny, Tuller & Myers had been employed by them to look over the details and expected a report within a very short time, and also that Mr. Moran had either been employed or was going to be employed to make up to date the appraisements of all of the properties they had under consideration, including the Italo. I understood that he was employed to make the appraisements for the eastern people. They said they expected the deal to be consummated and to be ready to be put through probably the latter part of February. They told us that all we would have out of the deal was the purchase of the $5,000,000 of bonds. They told us

(Testimony of Fred Shingle)

very plainly that it had been represented to them that we were very strong for the picture, which we told them that we were, and they wanted to know if we would handle up to $5,000,000 of the bonds, which we told them we would do, and then we asked them about the stock and Mr. Lyons was very emphatic, telling us that the stock bonus for the bonds was all going to be taken by the eastern brokers. At that time I considered that the stock that we were getting from the McKeon Drilling Company was our compensation for saving the syndicate situation and the financial situation earlier, and also for the handling of the bond issue. We were to have no other compensation for handling the bonds or for our commitment on the bond issue, other than what we had already received.

With the sales of the stock that we were making we were getting in a position, probably sometime during the middle of March, we were in a position to handle the $5,000,000 of bonds. We would probably have had to take the whole commitment ourselves and any relief that we got we would have had to take a chance on selling to the other brokers.

Toward the end of February we were in a position to take those $5,000,000 of bonds if they had been issued to us. Along in the spring certain changes took place in the proposals of the eastern people respecting the character of the set-up of the new company. We were making inquiries but were not always getting satisfactory answers, because the deal was being put off and put off, and we found during March that the deal, instead of being

(Testimony of Fred Shingle)

a bond deal which we were putting ourselves in a position to handle, was gradually turning into a stock deal and the bonds being gradually eliminated. There was a financial condition that existed in the country in the spring of 1929 which was that you could still get good bank credit on bonds but not on new stock issues, whereas probably six or eight or ten months before that you could finance new stock issues. All of the banks in San Francisco were gradually shutting down on listed stocks on credit they would give to brokers, and it was absolutely impossible to get any credit or any substantial credit at least on any new stock issues. It was a forerunner of the market break that took place in the fall of that year. We could carry about $5,000,000 of bonds for probably 15 per cent margin; that would take about $750,000 of our capital, and it meant that to handle $5,000,000 of stock we would have to put up the whole $5,000,000, because we couldn't borrow anything from the banks. I told Mr. Wilkes that. Practically all of the information which we were receiving was being relayed from New York. John McKeon was in New York at that time and it was being relayed to us by Mr. Wilkes. The situation became more acute and we could see in all of our different talks with Mr. Wilkes that it was getting more and more into a stock deal, which we couldn't begin to keep our promises on. I had discussions on those matters with Horace Brown quite often, and he made a trip east somewhere during that time in April. During that time I had numerous telephone calls with him and also some wires. These are some of the wires that I sent to Horace Brown.

(Testimony of Fred Shingle)
The wires were received in evidence, marked Defendants' Exhibit KK, and are in substance as follows:

Telegram dated April 18, 1929, to Horace J. Brown, New York City from Fred Shingle stating that Wilkes is borrowing $300,000 getting $25,000 each from twelve insiders for immediate Italo release we loaning $25,000. Bob McKeon claiming Wilkes and ourselves must give our proportion of million shares they hypothecated to borrow one quarter million for option purchases, told Bob never heard of this before and never considered ourselves as insiders or consulted in any way on deal. Be careful not let Jack consider us insiders this late date. Believe they will attempt to borrow everything we have. Melvin reports O'Melveny planning submit Palmer a bill for one hundred thousand. Unfair Palmer expect us to take any substantial part of load and referred to the wholesaling of stock.

Telegram to Brown from Shingle, dated April 9, 1929, stating that completed all Italo sales, Wilkes thinks deal have to be reduced to five million in underwriting taking in Italo and some of better properties under option. State Palmer willing to take half if Costhouse takes one half. Stalling deal too big for us.

Telegram dated April 10, 1929, stating that Wilkes is trying to get us to form a syndicate to make two million committment Palmer three.

When I refer to Wilkes borrowing $300,000, getting $25,000 each from twelve insiders, I use the term insider as a brokerage term. The insider is the fellow that

(Testimony of Fred Shingle)

really makes the initial deal. For instance, Palmer was doing that, and he would be responsible for the money to the attorneys and to the appraisers and things of that sort, and as long as we were not in on the same basis they were I wanted Horace to remind Palmer of his previous talk, because since we were only agreeing to take bonds we did not consider ourselves as insiders, as they had told us very frankly they were going to get the bonus of stock and keep it.

With respects to Exhibit 111, 115, 116 and 117, I have seen those letters before. They refer to expenses on stamp taxes for stamps on the McKeon stock and the amount of the bill was some nine hundred odd dollars, and the reference to the stock being transferred was the transfer from the McKeon escrow stock in accordance with the request that Horace Brown brought to me in December. On March 11, 1929, the date of Exhibit 116, Horace Brown was not in San Francisco. I wrote "O. K., F. S." on Exhibit 116. The circumstances of the receipt of Exhibit 116 and my putting "O. K., F. S." on there are as follows: There had been a controversy between Bob McKeon and our office over the stamps. I knew of the existence of those letters, and one day Mr. Byers came into my office and told me that he had just received a check from the McKeon Drilling Company for a part of those stamp taxes, and that they were still complaining that they should not pay them all, so he told me the amount in dispute was around about $500, and I said, "Allright, O. K., go ahead and pay it," and I remember putting that on there. I do not have any recollection of

(Testimony of Fred Shingle)

reading the letter. The first time I recall seeing it was when it was put in evidence here. I know nothing now and did not know anything about the representation or the contents of that letter other than the fact that it recited a remittance of $400, and kicking about the balance of it when I O. K.'d it.

The big deal was never concluded. By that I mean the eastern deal. It was pretty well abandoned in the summer of 1929. If the deal had gone through on the basis Mr. McKeon was negotiating in New York the price of the Italo stock which would have been converted into the new name, which was going to be the McKeon Oil Company, would be $16 to $18 a share, which represents $1.60 to $1.80 per share for the old $1.00 par stock. We found ourselves in a rather embarrassing position with respect to the syndicate stock. The syndicate agreement gave the syndicate manager very broad powers. We could do what we wanted with the stock, but Mr. Brown and myself had a great many talks on the subject, and if we had sold any syndicate stock at around $5.00 or $10.00 or even lower, or at any price, we would have sold it, we thought if the McKeon deal had gone through we would have been very severely criticized. During all of this time the market was very substantially less than $1.60 per share for the common. If the big deal had gone through as we expected it would, we would have been subjected to criticism and a great many of the large syndicate members, the members who had the largest amount in the syndicate, did not want us to sell, because it was for quite a while almost a certainty that the deal would go through. We discussed that question with some

(Testimony of Fred Shingle)

of the larger syndicate members and took their advice and acted as they suggested, and also it was our own judgment that we had better hold it.

With respect to the letter set up in count 13 of the indictment signed by Horace Brown, extending the syndicate for six months from and after July 12, 1929, Mr. Brown had my power of attorney for the purpose of making that extension during the time I was away. At the end of the time limit in that letter we distributed the syndicate stock that remained unsold, pro rata to the syndicate members, according to their ownership therein. Instead of selling the stock we distributed it in kind to the syndicate members, and that practically ended the syndicate. We had forty-odd thousand dollars of notes of the Italo Company which were paid to us in lieu of a preferred stock dividend, and we created an escrow which is still in existence with the Farmers & Merchants Bank of Los Angeles, turning those notes over to the bank with authority to collect, and if the notes were paid, which they have not been, to distribute the money to the syndicate members. Except for those preferred stock dividend notes, I distributed all of the assets of the syndicate in money, stock and everything else, and that ended my connection with the transaction.

(Examination by Mr. Abrahams:) With respect to the telegram shown me by my attorneys, wherein I mention the wholesaling of securities, that is a brokerage term. In the underwriting of an issue of bonds, there are two or three stages. First, the firm that takes the commitment, who is the underwriter, might buy five or

ten million bonds, and have the entire commitment of that and the liability; then he may go out and sell to other dealers at a profit any portion of that issue that he can or wants to, at a profit, and sometimes at cost. Then the retailing would be done by the brokers to their customers. The same rule applies to stock when the underwriters take it over in a large block; that is the wholesale end of it. They underwrite it and take it out in a large block and then wholesale it out to other brokers and other dealers. When the other dealers sell it through the Exchange to their customers, that is retailing stock. That is just like the Palmer deal. They were the underwriters in that deal, or would have been underwriters with Mr. McKeon in the deal, and they would be wholesaling to us at some sort of a profit. Usually the underwriter's price is less than the wholesale price, and it is sold so the retailer can also make a profit. If this block of 3,000,000 shares of preferred and 3,000,000 shares of common stock that was purchased by the syndicate for three and a half million dollars had been offered on the Exchange in a block, it would have been impossible for the market to absorb three to six million shares of stock at any price. If that much stock had been offered across the board through the exchange, the board of governors would have stopped trading on that stock immediately. Stock is no different, after all, from any other commodity. The price is controlled by supply and demand that particular day or that particular week or that particular month on the exchange.

When the so-called big syndicate was organized the price was agreed upon at $1.16-2/3 a unit, a unit con-

sisting of a share of preferred and a share of common. That price was agreed to by the syndicate, leaving a margin so that when it was raised there would be a profit. At least a profit was expected. No one would go into a syndicate of any kind unless they expected to make a profit. As a matter of fact, what developed was this: when that syndicate was formed in the summer and the early fall of 1928, if we had sold all the stock to Vincent & Company the most profit any of the syndicate members could have possibly made was around fifty or sixty per cent. As it turned out, if they had gone out in January, 1930, and sold their stock at the prevailing market, there would have been a loss of about 25 per cent, but as it is, anybody who still held their stock would have had a loss of 48 per cent. There was 52 per cent paid back in cash.

This preferred stock is preferred over the common stock both as to assets and as to income, so that in the event of liquidation the preferred stock would have to be paid out at par plus unpaid accumulated dividends before the common stock could get anything. At no time did I have any discussions with Raleigh McKeon in regard to any of these transactions. I do not recall having met him at all until recently.

At or prior to the time that the contract was made between the McKeon Drilling Company and the Italo Petroleum Corporation of America, I did not have any agreement or understanding, tentative or otherwise, with any one of these McKeons that I was to get any part of the stock which was to be issued in consideration of

(Testimony of Fred Shingle)

the transfer of the McKeon Drilling properties to the Italo. At that time or immediately thereafter, when the syndicate was being organized, I was not informed by any person that there was any such agreement as to anybody, with the McKeons, that the McKeons were go give any part of that stock to anybody else. So far as I know, each one of these transactions, whereby the McKeons gave, sold or disposed of their stock to various persons, those transactions arose at or about the time they took place, and that is true with respect to the stock which was transferred to Shingle, Brown & Company and to me personally. The stock that was transferred to me personally was transferred to me for the benefit of my firm.

(Examination by Mr. Meader:) About October 16, 1928, when Mr. Lacy, Mr. Stewart, Mr. Chapin and their associates went on the board of directors of Italo, I think Myers went on the board at the same time.

(Examination by Mr. West:) Mr. Masoni did not receive the $25,000 from the Brownmoor matter as shown on Exhibit 299. I never had any conversation with Masoni or Perata with reference to the David Garvey account with the Montgomery Investment Company.

(Examination by Mr. Wood:) None of the directors of the Brownmoor Oil Company or Mr. Siens, Mr. Shores or Mr. Westbrook was a subscriber to the $80,000 syndicate.

(Further examination by Mr. Carnahan:) Neither Horace Brown, Axton Jones, Rossiter Mikel or myself

(Testimony of Fred Shingle)

at any time during the period that I have related was an officer or director or connected in any way in any official capacity or fiduciary relationship with the Italo Petroleum Corporation, or with any of the other companies that have been mentioned in evidence. The partnership of Shingle, Brown & Company was formed in the first part of the year 1929, because under the rules of the San Francisco Stock Exchange we could not be a member thereof unless we were a partner.

(Examination by the Court:) The total number of shares of stock of Italo that I received from the McKeon Drilling Company as compensation was approximately 150,000 shares of common stock and no preferred stock.

CROSS EXAMINATION

The first syndicate which I had anything to do with according to the evidence was the $80,000 syndicate, which was brought about because of the Italo wanting to borrow $80,000. Wilkes and Vincent asked me to take the matter up, and both seemed interested in having Italo borrow $80,000, which they asked us to do. Shingle, Brown & Company could have loaned the $80,000. A syndicate usually has a manager. I did not receive any pay for managing the $80,000 syndicate. The purpose of a syndicate is to accumulate funds in one group. In this instance the subscribers signed a subscription list, subscribing for $80,000. I subscribed $5000, which was paid to the company. The list was then open and we could invite whoever we wanted to join the syndicate.

(Testimony of Fred Shingle)

We could have rejected anyone we did not want in the syndicate.

I think Vincent & Company put up the 80,000 shares of bonus stock. I knew then it must be Vincent or some one else associated with him who was putting up the bonus stock. I doubt whether I would have gone into the syndicate for a straight 6 per cent loan without bonus, or for the 7 per cent called for in the agreement. Vincent added the stock to make it interesting.

Wilkes had nothing whatever to do with putting up the bonus stock. So far as the par value of the stock was concerned, it was equal to the amount of the loan itself. I believe it took about one to two weeks to raise the $80,000. The first subscribers were friends and acquaintances of ours, and I think the remaining subscribers were mostly strangers to us. These strangers were sent over from the Italo office. The list was in our office and they would come up and sign it and pay the money. The syndicate members, if they read the agreement, understood that when the deal was closed they would get their money back with the bonus. The loan was repaid by the Italo Company in about a week, and I thereupon distributed to each syndicate subscriber his proportionate part of the principal with interest. After the Brownmoor stock was converted into Italo stock, the Italo stock was distributed to the syndicate subscribers. For my $5000 subscription I received 2500 shares of common and 2500 shares of preferred stock of $1.00 par value, plus the $5000 with 7 per cent interest. John Perata put up the $5000 subscribed before in the name of Mikel

(Testimony of Fred Shingle)

and Jones, and received back that money with 7 per cent interest, plus 2500 shares of preferred and 2500 shares of common stock. Brown subscribed for $2500 but did not put up that money. The money was put up by O. B. Wilkes, who was Mr. A. G. Wilkes' wife, and when the deal was closed we paid to Mrs. Wilkes the $2500 with interest and 1250 units of Italo stock.

So far as the Shingle, Brown, Jones and Mikel subscriptions are concerned, that was considered as a firm transaction, so that instead of having 12,500 in it we had 5000. They shared in my profits and the bonus, which probably went into the Montgomery Investment Company, and after it found its way into the profit and loss it would be divided. That is all the four of us got as bonus from this deal.

I was manager of the next syndicate of June 18th, which was in turn turned over to the July 12th syndicate. I recall the syndicate consisted of 6,000,000 shares of stock to be sold for $3,500,000. All of the $3,500,000 would not be raised from the sale of stock. There was $1,-911,000 of syndicate money subscribed and paid in before we sold a share of stock. The $1,911,000 raised in the big syndicate was in general raised in the same manner that the $80,000 was raised in the other syndicate, by people subscribing to the syndicate. The syndicate agreement outlines the inducement offered to people to subscribe to the syndicate. In general it was for the syndicate members to pay into the Italo Petroleum Corporation for property purchased accounts and other expenses a sum of money not to exceed $3,500,000, for which they

were to receive 3,000,000 shares of preferred and 3,000,000 shares of common stock, both having a par value of $1.00 per share. The subscribers to the big syndicate did not get a million and a half bonus. They subscribed $1,911,000 odd dollars, which was paid to me. I in turn paid all that money off to the company or to their order. The syndicate agreement was dated July 12th, and on July 13th, or one day later, July 14th, or two days later, if I could walk into the Italo offices or send for them and deliver a check for $3,500,000, assuring myself at that time that they would complete their property purchases so that that would leave them in a position where they didn't owe on this property purchased over $2,750,000, then my job was done and I could walk out with the 6,000,000 shares of stock, but as it turned out this money came in in dribbletts, and over a period of several months, and that couldn't happen and did not happen. The money was put in and taken out at different times. That was the last syndicate. The syndicate subscribers to the big syndicate received back 51.8 per cent in cash and the other remaining stock in the syndicate which we did not sell, consisting of approximately 2,500,000 shares of preferred and 900,000 shares of common, was delivered to the syndicate subscribers.

I remember my testimony with reference to the big deal which did not go through, and the letters concerning the distribution of the 961,500 shares of common stock, in which Mr. Wilkes stated that after I had set aside 112,000-odd shares that the balance of it would be divided equally between Mr. Wilkes and Shingle, Brown &

Company. That division was made. That 961,000 shares of stock came from the McKeon escrow stock and was part of the four and a half million shares of stock in the McKeon escrow. We had four and a half million shares of stock in the McKeon escrow less a certain amount which was sold to the International Securities Corporation. We kept our proportion of the 961,000 shares of stock, which would be approximately 450,000 shares.

The McKeon deal did not go through and we didn't give back the 450,000 shares because we had performed a pretty good service and saved this company once, and I think that compensation was given to us for that, probably more or as much anyway as standing by and helping finance in the future. We would expect pay for something we did and we didn't get paid until after we had done the job. I do not know without looking at the records whether Mr. Wilkes got his 450,000 shares.

I testified yesterday Mr. Vincent came into our office and said with reference to the $83,000 check, "Here is a fulfillment of my promise," and cut us in on a part of his profits on his option. Although I did not know the importance of it at that time, I think from what I have known since that we did quite a lot to earn the $83,000. It was Vincent who handed me the $83,000 check. I told him to change the check from Shingle, Brown & Company to the Montgomery Investment Company for the reason that it was an individual matter, and we had a corporation with some other stockholders in it, and we did not think it was right to subject our corporation to

(Testimony of Fred Shingle)

any liability. The $83,000 went into the Montgomery Investment Company.

Q BY MR. WHARTON: But I am asking whether or not if it had gone to Shingle, Brown & Company, a corporation, that all of the stockholders would have been entitled to it.

A I don't think that the face of the check would make much difference in the payment. That never occurred to me.

Q It didn't occur to you, for instance, that Dake would have gotten any of it?

A Dake was getting plenty out of us all the time.

Q You didn't want Dake to get any of the $83,000?

A We didn't care about Dake. He wasn't entitled to any of it. I never gave Dake a thought; he didn't enter our mind one way or the other. Vincent sent over another check. The $83,000 check, together with the $24,750 and the $44,092.90 checks were all put in the Montgomery Investment Company account. We did not sell the 230,000 units to Vincent for the total of those three checks.

Vincent's contract to sell stock for the syndicate under his agreement was cancelled about October 15, 1928, because of the fact that he had not paid for the stock he had agreed to sell. Partial payment sales were taken care of through the Bank of Italy escrow, and for the stock that was substituted up there, there was a sale amounting to some hundred thousand and eight hundred and some odd dollars, as I remember. That money was divided into four parts, and the McKeon Drilling Company, Mr. Wilkes, Mr. Siens and ourselves each got one fourth of

(Testimony of Fred Shingle)

the hundred odd thousand dollars. There was another sale amounting to $86,310 and some cents, which was all delivered to the McKeon Drilling Company, and they gave us one-fourth of that, which was around twenty-one thousand dollars. I do not know of any other sale where we got around $17,000, but if we did receive it it would go into our profit and loss account.

With reference to Exhibit 128, you will have to have Mr. Byers refer to the books for the matters set up in that letter.

After Vincent & Company's contract to sell the stock was cancelled, a brokers' pool was formed. I think there were two or three pools, designated Pools A, B and C. Graham, Atkinson, Plunkett, Lillienthal, J. J. Meggs & Company and Shingle, Brown & Company were in Pool A. Whatever profits there were in the pool would be divided among the members of the pool. Vincent had an option to sell 500,000 units at a price of $1.60 net to the company.

This letter dated September 10, 1928, addressed to Italo Securities Corporation, 67 Wall Street, New York, N. Y., is signed by me. The letter was received in evidence and marked Exhibit 318, and grants to the Italo Securities Corporation for a period of thirty days from September 10, 1928, an option on 100,000 units of Italo stock at the price of $1.50 per unit, with a further option in the event that the option granted was exercised, the latter option to be at increased prices.

That option was cancelled about October 15th. The syndicate stock was in the hands of Shingle, Brown &

(Testimony of Fred Shingle)

Company. As syndicate manager I furnished the stock to those different pools as they sold it. I do not know how much profit was made by the different pools, but the books would show.

With respect to Exhibit 225, showing the amount of $16,173.62, I presume we received that money from that pool. You would have to ask Mr. Byers relative to these matters as I am not familiar with them. I do not know anything about the bookkeeping records of Shingle, Brown & Company.

It was thereupon stipulated that the records were records of Shingle, Brown & Company.

Thereupon Government counsel offered the records in evidence, and they were objected to as incompetent, irrelevant and immaterial, no proper foundation laid, hearsay and not binding on any defendants other than the defendants Shingle, Brown and Jones. Objection overruled. Exception.

The documents were received in evidence and marked Exhibits 319, 320 and 321.

With reference to Exhibit 320, I do not know anything at all about bookkeeping; whether that is a profit or a receipt, I do not know. I would be glad to answer that, but I know nothing about bookkeeping. If Mr. Byers tells me that is a profit, that is a profit; if he says it is a receipt, it is going to be a receipt. I am not qualified to answer the questions as to whether or not those amounts on there are profits.

The same is true with respect to Exhibit 319.

(Testimony of Fred Shingle)

After the Vincent contract was cancelled, the pools were formed. As syndicate manager I furnished to the pools a part of the stock which they sold. As the stock was sold, Shingle, Brown & Company would share in the profits or losses that the pools made.

The pools were formed first at our suggestion. A broker—every stock has to have a sponsor of some sort, I don't care what stock it is, from United States Steel down. Every broker or some one backing that stock, what they call a sponsor. Most recognized exchanges will not allow a stock to be traded in unless it has a sponsor. That is, somebody that knows about the company and more or less takes an interest in the company, and that the other members of the exchange can refer to for certain information. So in this particular case, before the other brokers would join this pool, they naturally made a lot of investigations on their own behalf. There are three things that a broker wants to know about anything. First, what is the value of the property? Second, what is the management? And, third, what are the earnings? That is the foundation for any bond issue or stock issue. In the case of the Italo, getting back now to those dark days of September 20, 1928, when Frederic Vincent & Company ran out on us and the whole thing was a very black, dark picture, we took it up with our broker friends. We spoke to more brokers than joined the pool. Other brokers were very busy in 1928, and had their hands full with one thing and another. The brokers all lived in San Francisco. Later on I think you will find in Pool B or C we had two Los Angeles brokers in addition to our four.

(Testimony of Fred Shingle)

Those are not the men who actually sell the stock over the counter. They sell the stock to pool members. We do not know where the pool members sell the stock; no one knows where they sell it. It is a clearing house, like a bank clearing house. In other words, we send a representative over to the Stock Exchange and there is an order in there to buy 5000 shares of stock or 10,000 shares or 500 shares, and there are probably sixty or seventy brokers on that floor. There were probably 72 different representatives on the floor. It is like any other commodity; it is nothing but supply and demand. Somebody wants to buy 5000 shares and somebody wants to sell 5000 shares. It is very usual in a stock transaction, where the stock is not a dividend paying stock, to always carry it in street names so it would be almost impossible to try to trace the ownership of that stock. This pool was formed and as the normal demand each day and each week comes on on the curb exchange or the stock exchange for the buying and selling of that stock, that is what fluctuates your market. A pool is generally the subject of a written agreement, which consists of the three or four or five brokers who form the pool. They make profits or they may make losses. Generally the terms are that one broker may have a one-half interest and some other broker a one-tenth interest and so on; this is, I think, a 25 per cent interest. In this case we got the stock from the syndicate manager. The syndicate manager agreed to furnish the stock at certain prices. There is more distributing among the brokers than selling stock. For instance, during the month of December, 1928, we bought something like 179,000 or 180,000 more shares of stock than we ever

(Testimony of Fred Shingle)

really sold. As I remember it, the prices fixed by the syndicate manager for sale of the stock to the pool members fluctuated up for each 500,000 share lot. One pool would sell to another pool. The object of pools is to make profits, but they might make losses. Pool A might sell to pool B or to pool C and make a profit, and the pool members would derive a portion of whatever profit was made.

(Examination by Mr. Carnahan:) So far as the market price is concerned, there is not the slightest difference between operations by a pool and a single broker. The only difference is that in a pool there are three or four or a half a dozen acting in concert instead of one. In marketing stock on the exchange there are certain brokers who have orders to buy and other brokers who have orders to sell, and we sell stock only when there are more people buying than there are selling. With this pool that I had here, they simply had a contract with me as syndicate manager to option some of this stock that they knew they could get. Whenever there were more sales on the exchange than buys, I got rid of some of the syndicate stock. When other people who had bought stock but wanted to sell it to our pool, we had to buy that stock to maintain the market, and then resell that stock when there was an opportunity again. The syndicate stock simply went out as there was a surplus or excess demand over the outside supply, but of course the operators of the pool are always interested in trying to keep the price at a level. In that respect there is no difference between a pool and a single operator. The only reason for forming a pool is to

(Testimony of Fred Shingle)

get more people, to get more money, to get more responsibility back of it.

(Further examination by Mr. Wharton:) This file contains the agreements with the various pools that I have been talking about.

The file was received in evidence and marked Exhibit 322.

Exhibit 322 is dated October 15, 1928 and is addressed to Plunkett-Lilienthal & Co., Geary, Meigs & Co., Graham, Atkinson & Co., Shingle, Brown & Co., and signed by the said addressees and Fred Shingle, Syndicate Manager, by the terms of which the said syndicate manager granted to the addressees an option to purchase 2,500,000 shares of the common capital stock of Italo Petroleum Corporation of America, having a par value of $1.00 per share, as follows: on or before December 1, 1928, an option to purchase 500,000 shares at a price of $1.05 per share, less a selling commission of not to exceed $20.00 per 1000 shares; if said option was exercised before December 1, 1928, an option to purchase an additional 500,000 shares on or before January 1, 1929, at a price of $1.10 per share, less a selling commission of not to exceed $20.00 per 1000 shares; if said option be exercised, an additional option to purchase 500,000 additional shares on or before February 1, 1929, at a price of $1.15 per share, less a selling commission of not to exceed $20 per 1000 shares; in the event said option was exercised, an option to purchase 500,000 additional shares on or before March 1, 1929, for a price of $1.20 per share, less a selling com-

mission of not to exceed $20 per 1000 shares; and if said last mentioned option be exercised, an option to purchase on or before March 1, 1929, an additional 500,000 shares on or before April 1, 1929, at a price of $1.25 per share, less the same commission. It further provides that the said addressees, were not acting as the agent of the syndicate manager but as independent dealers.

The commission of $20 per 1000 shares would be $10,000 commission on 500,000 shares.

Said Exhibit 322 further contains a letter dated November 1, 1928, addressed to M. H. Lewis & Co., and Dunk-Harbeson & Company, advising that Shingle, Brown & Company, Geary, Meigs & Co., Plunkett-Lilienthal & Company and Graham, Adkinson & Company have an option to purchase 1,500,000 shares of common capital stock of Italo Petroleum Corporation of America, 500,000 shares of which must be taken and paid for prior to February 1, 1929, an additional 500,000 shares prior to March 1, 1929, and an additional 500,000 shares prior to April 1, 1929, and that said firms include the addressees into what is known as Pool B, and the stock to be paid for by Pool B at the following prices: the first 500,000 shares on or before February 1, 1929, at $1.25 per share; the next 500,000 shares at $1.30 per share, and the next 500,000 shares at $1.35 per share; further advising that the said Pool B would start operating November 1, 1928, consisting of the above mentioned six members, and that the profits and losses would be borne equally between the said six members; further advising that it was the syndicate manager's understanding from Mr. Plunkett that the

pool was short at the close of business November 1st to the extent of 75,100 shares of common stock at prices around $1.60 per share. Said letter is signed by Fred Shingle, and the addressees.

Said exhibit also contains a letter dated December 8, 1928, signed by Fred Shingle, Syndicate Manager, advising that Plunkett, Lilienthal & Co., Geary, Meigs & Co., Shingle, Brown & Co., and Graham, Adkinson & Co. have an option to purchase 925,000 shares of common stock of Italo Petroleum Corporation of America, and that said four firms propose to form a pool C as of the close of business December 6, 1928, said pool to include the said firms except Graham, Adkinson & Co., and in lieu of that company to include M. H. Lewis & Co. and A. D. Adkinson, the said pool to take up said stock at prices of $1.30 per share and $1.35 per share, as of March 1, 1929, and April 1, 1929, respectively

I only recall three pools, which are those mentioned in Exhibit 322.

We had an account known as A. F. Jones No. 1, an account known as R. L. Mikel No. 1 and an account known as R. L. Mikel No. 2. As syndicate manager we furnished to each of the pools a portion of the stock that they agreed to sell. The pool would purchase other stock elsewhere. We supplied a certain amount of stock called for in that contract for the pool but not at the time it was called for. When the stock was delivered to the pool, the pool paid the syndicate for the stock and it was immaterial to me as syndicate manager how much the pool sold the stock for. I as syndicate manager was paid for the stock

(Testimony of Fred Shingle)

at the time it was delivered to the pool, and I, as a member of the corporation of Shingle, Brown & Company was a member of the pool and proceeded as such to sell the stock we had optioned and paid for, together with other members of the pool, and we also bought the stock that we had sold out of the syndicate.

The firm of Shingle, Brown & Company, as a member of each of those pools, was not active in the sale of stock. In 1928 we were not an active member of the Exchange, but were known as an associate member. The difference between the two is that an active member has full access to the floor of the Exchange and does all of the buying and selling of orders. An associate member had no access to the floor of the Exchange, so that any sales that we would make or any orders that we would make on this or would get for buying or selling on this or any other stock we would have to have executed through some other broker of the Exchange who was an active member. Corporations are not admitted to do business in any Exchange, but partners are. Different pool members were the trading members of the pools. Probably one week Plunkett and Lilienthal in San Francisco might do the active work on the floor of the Exchange, and sometimes Meigs would do so. At the time Pool A was formed, Shingle, Brown & Company was a corporation and had no representation on the floor of the market. Shingle, Brown & Company, a corporation, would share in whatever profits or losses were made on the sale of the stock which had been optioned and paid for and received from Fred Shingle as syndicate manager into the pool. I am advised by Mr. Byers, our accountant, that those figures on those

sheets do not represent profits, but represent gross receipts.

With reference to the entry on Exhibit 226, reciting check to S. B. Company, profit pool A, $31,380.00, that does not mean what it says. It means gross receipts instead of profits.

I identify my initials "F. S." on this document addressed to Fred Shingle.

The document was received in evidence, and marked Exhibit 323. It is dated January 28, 1929, addressed to Shingle, Brown & Company, from M. H. Lewis & Company, acknowledging receipt of check in the amount of $24,554.90, representing our proportion of the cash profits from pool operations of pool B.

The mechanics of those matters was handled by Mr. Byers, our accountant, who was handling the records of Shingle, Brown & Company, a corporation, and Shingle, Brown & Company, a partnership. Mr. Byers was our auditor. We had faith in Mr. Byers, and if he made mistakes we assumed it and gave him authority to act for us.

With reference to Exhibit 225, the entries on there indicating that certain checks were drawn to the pool members, would indicate to me that we sent out those checks to those pool members, but I do not know anything about the mechanics of the bookkeeping of the matter at all. We had a pool manager at different times. The person that was handling the pool would be the manager for that week or that month or that day, and for the particular time that he had authority to do the trading on the floor

(Testimony of Fred Shingle)

of the Exchange. According to these records, they indicate that the money came into the possession of our firm and that we disbursed it to the pool members, and that would probably be correct because our firm had possession of the syndicate stock, so that would be the procedure. In other words, we kept the account as regards the money. My recollection is that we didn't keep any of the accounts of the purchase or sale on the outlet. I think they were kept by the active members of the Exchange.

With reference to Exhibit 320, showing the issuance of checks for $24,554.90 to each of the pool members, that would indicate that we drew the checks and paid them to the pool B members on account of Italo Pete stock, there being six members of the pool. Those are receipts on that amount. The receipt might have cost that firm $30,000 to get that $24,000 in, that is, it would cost any one of the firms mentioned that amount. If you talk about the difference between receipts and profits, it makes a big difference. I know what our overhead was. I think it was thirty-five to forty thousand dollars a month, probably averaged $35,000 a month. It may be called profit, but it cost us a great deal to get the money in. I imagine as a matter of bookkeeping that if we have a profit on a deal and call it a profit it goes into the loss and gain account. The way the broker runs his office is this: They have so many receipts coming in; for instance, our firm in 1929 had gross receipts from this and all sources of a million and a quarter, whereas, our net earnings for that year were under $400,000.

(Testimony of Fred Shingle)

With reference to the entries on Exhibit 319, referring to Pool C, Italo Petroleum, showing that on December 4, 1929, checks for $7,235,69 were drawn to each of the four pool members, it would be my impression that those checks went out to those people as payment for their interest in Pool C. I imagine that in most instances any stock left in a pool after the pool was closed would be distributed among the pool members.

Thereupon three letters identified by the witness were received in evidence and marked Exhibit 324, being acknowledgments by pool members of checks from Shingle, Brown & Company, cash settlement of the money due to the pool members under the Italo Corporation of America pool, the check being in the sum of $24,554.90.

This Exhibit 325, a letter, was signed by me, and is dated December 8, 1928, and this bundle of checks was issued by Shingle, Brown & Company, they being Exhibit 326. They are the checks that were issued by Shingle, Brown & Company to various people whose names appear on the checks.

(Examination by the Court:) The 2,500,000 shares of common stock in the syndicate that was optioned to the pool was part of the 3,000,000 shares of common stock that the syndicate received for the payment of the sum of around $3,500,000. Some of the pool members were members of the original syndicate. The syndicate received 3,000,000 units of stock for around $3,500,000, and the $3,500,000 was actually paid to the company and releases executed by the company. As syndicate manager I gave

the options to these pools under which they were entitled to take the stock at various prices. The pools bought or sold the stock to the best advantage. Apparently there was a profit in every pool, and they could have made a great deal larger profit by withdrawing stock from the market. The object of the pool was to try to keep the stock at a steady price. The pools had nothing to do with the syndicate other than to buy the stock from the syndicate so that the money went into the syndicate and stayed there until it was paid out to the company. The pool had agreed to divide the profits and losses among themselves. and it happened to be a profit.

With reference to the management of the pools, I would say that our firm was probably manager of the financial end of it, but as far as running the pool is concerned, that was done by the other brokers for the reason that we were not actual members on the Exchange entitled to buy and sell. The moneys were paid out by Shingle, Brown & Company.

REDIRECT EXAMINATION

Thereupon the big syndicate agreement, being part of Exhibit 280, dated July 12, 1928, was read to the jury. There were some seventy-odd subscribers to the said syndicate who paid in something like $1,900,000.

I signed Exhibit 161, giving Frederic Vincent & Company the option to buy 500,000 units of stock. We had in the syndicate 3,000,000 shares of preferred and 3,000,000 shares of common stock. I made no other agreement other than this with Frederic Vincent. After this agreement was made I had 2,500,000 units of stock undisposed

(Testimony of Fred Shingle)

of and uncommitted. I had that stock at the time I made the agreement with the New York people that Mr. Wharton read yesterday. There was no double commitment of that stock.

I did not know anything about or have anything to do with the mailing of any of the letters or circulars that are alleged in the indictment in the counts from 1 to 14, excepting my own letter to Mr. Rohde in the 12th count, and the letter signed by Horace Brown in the 13th count, extending the term of the syndicate for a period of six months. I did not know anything about any of the other similar letters or circulars that may have been written or mailed. During all of this time I did not have access to or knowledge of any of the books or records of either the Italo Petroleum Corporation or the McKeon Drilling Company, Inc. In writing the letter set up in the 12th count of the indictment I did not have any purpose other than to accurately answer the inquiry of Mr. Rohde's letter.

(Redirect Examination by Mr. Abrahams:) At the time the brokers' pools were organized, the brokers who became members of those pools were informed that I as syndicate manager was dealing with the pools and also with the corporation of which I was an officer, Shingle, Brown & Company, and that that company was going to be a member of the pool. There was no secrecy about that. I as syndicate manager did not have any facilities for selling stock other than through the brokers, and the only method of handling the stock at all was through brokerage houses, either our own firm or the others.

(Testimony of L. J. Byers)

There was no secrecy about the big syndicate agreement in evidence, and I understand that that was filed with the Corporation Commissioner. A copy of it was kept by the office of Shingle, Brown & Company where it could be inspected by anybody who wanted to see its terms or wanted to become a member of the syndicate.

RECROSS EXAMINATION

The syndicate members lost money in the syndicate. The pools did not lose money. They made gross receipts. I don't know how their books would turn out at the end of the pool. The syndicate members were not notified in writing of the profits of the pool. Probably some were, but I would not say all.

(Examination by the Court:) I made an accounting to the 78 syndicate members.

L. J. BYERS,

recalled as a witness on behalf of the Defendants, testified under oath as follows:

I have made an examination of the books and records of the Italo Petroleum Corporation of America for the purpose of ascertaining the financial condition of that company during the month of May, 1928. According to the books and records as of the close of business May 1, 1928, the corporation had on hand in the bank, $53.24. Thereafter for the first eleven days in May, 1928, with the exception of the 2nd and 3rd of May, their books disclose an overdraft in the various banks, the maximum of which was on May 10th, of $20,845.39. On May 11th they had an overdraft of $20,105.50. On May 12th

they deposited $48,787.27, which left them a balance as of the close of business of $28,681.77.

On May 14th they had a balance of $39,805.77. The bank balance increased up to the 16th of May. On May 16th they made a deposit of $120,482.44, leaving a balance in the bank as of the close of business that day of $142,158.01. The $80,000 borrowed by the company from Fred Shingle was deposited on May 17th, leaving a balance on that date of $279,452.01, including the $80,000 loan.

The bank credit balance continued up to and including May 23, 1928. The $80,000 was repaid, according to the books and records, on May 21, 1928, by check on the American Trust Company, leaving a balance after that payment of $257,903.00. The aggregate amount of income of the company for the month of May, 1928, from various sources was $416,703.55, which included the $80,000 loan. Of that aggregate deposit of $416,703.55, $315,349.84 was proceeds of the sale of stock received from Frederic Vincent & Company, the $80,000 loan and miscellaneous receipts of $21,353.71.

I became supervisor of accounts for Shingle, Brown & Company on August 1, 1928, and immediately made an audit of their books, so that I am familiar with the books and records kept by that company. It was the practice and custom of Shingle, Brown & Company to keep a record of all incoming or outgoing stocks or securities in which any member of the firm or the firm itself had any interest. That was one of the rules of the Stock Exchange.

(Testimony of L. J. Byers)

I have made an examination of the books and records of Shingle, Brown & Company for the purpose of ascertaining whether or not they disclosed the receipt by that company or any member of that firm of four certificates of stock, two preferred and two common, aggregating 230,000 units of stock, referred to on Exhibit 299. That refers to line 11 of Exhibit 299, showing 230,000 units of stock in the name of Fred Shingle. I have diligently searched those records and cannot find where those particular certificates were ever recorded in the books of Shingle, Brown & Company.

With respect to Exhibit 299, line 4, showing the receipt by Horace J. Brown of 1250 units of Italo Petroleum Corporation of America stock, I have examined the records of Shingle, Brown & Company and they do not disclose those particular shares going through the books of Shingle, Brown & Company. The same is true with respect to item No. 5, showing stock going to R. L. Mikel, and Item No. 6, showing stock going to Axton F. Jones. The stock shown on Exhibit 299 as going to Brown, Mikel and Jones does not appear as going through the records of Shingle, Brown & Company, and does not appear in the individual accounts of either Brown, Jones or Mikel in the records of Shingle, Brown & Company.

I was instructed in October, 1928, by Mr. Shingle to go to the office of Frederic Vincent & Company for the purpose of making an examination of the books and records of that firm, to ascertain how much stock of the Italo Petroleum Corporation of America had been sold by Frederic Vincent & Company, but had not been delivered. I went to the office of Frederic Vincent & Company and

met Mr. Stratton, and told him that I had instructions from Mr. Shingle to determine his short position in Italo stock. By short position I mean the number of shares he had sold but had not on hand to deliver, of Italo Petreoleum Corporation of America stock. Mr. Stratton assigned me a desk and gave me his records. He gave a stack of subscriptions, together with schedules and charts giving the name, address, number of shares, and if paid in full it was marked paid in full, and if it was a partial payment subscription it showed the amount paid on the original subscription and the balance due. I worked on the records until about 4:30 in the afternoon and then returned them to Mr. Stratton and went back to the office, and returned to Frederic Vincent & Company's office the next day. I told the bookeeper in the office I wanted the records of the position on Italo, and she gave me some schedules and records. They were not the same records or schedules that had been handed me on the day previous by Mr. Stratton. I asked her if she was sure that these were her records of their position on Italo and she said yes. I took them and checked them against the records I had made the day previous. I asked the young lady the second time if this was a correct list, and she assured me it was, and I immediately checked it against the list and working papers I had made the day prior. The list the young lady gave me was not the same one that Mr. Stratton gave me, inasmuch as the list Mr. Stratton gave me had more names on it. As an illustration, it showed John Doe purchaser of 100 units. The list the girl gave me showed John Doe purchaser of 500 units. The first list that Mr. Stratton gave me showed John Doe No. 2 had

(Testimony of L. J. Byers)

purchased 100 units and had paid for them in full. The second list the girl gave me showed John Doe No. 2 had purchased 100 units and had only made partial payment on it. I returned the list to the young lady and went back to my office.

Q Did you have a conversation with anyone at Shingle, Brown & Company after you returned?

Objected to by the District Attorney as incompetent, irrelevant and immaterial, and hearsay.

MR. SIMPSON: I expect to show that he returned to his office and reported what he had found to Mr. Shingle.

Objection sustained. Exception.

I suggested to Mr. Shingle that the firm of Haskins & Sells be employed to make a check and audit of the books and records of Frederic Vincent & Company with respect to their position on Italo stock. That firm was employed for that purpose and made such an investigation and audit. They reported to me the conclusions they arrived at from that investigation and audit.

Thereupon the report of Haskins & Sells, made to the witness, was produced, and Government counsel objected to any evidence relative thereto upon the grounds it was incompetent, irrelevant and immaterial. After discussion between court and counsel, the court sustained the objection upon the ground that the matters leading up to the final settlement of the dispute with Frederic Vincent & Company, resulting in the distribution to him of a portion of the syndicate stock and a portion of the stock of the McKeon Drilling Co., Inc., was immaterial, and further ruled the said evidence was incompetent for the purpose

of impeaching the witness Stratton and the witness Vincent on the ground that it was collateral matter. Exception.

I identify these work sheets and pencil memorandum as the work sheets handed to me by the auditing firm of Haskins & Sells with their report upon the findings upon the books and accounts of Frederic Vincent & Company. That was handed to me by Mr. Shobe of Haskins & Sells. They would not give us a certified report, and this pencil memorandum is the only report which they would give, accompanied by the work sheets which I have just identified.

Thereupon defense counsel offered the exhibit identified by the witness in evidence, and it was objected to as incompetent, irrelevant and immaterial. Objection sustained. Exception.

The exhibit was marked Defendants' Exhibit LL for Identification.

With respect to the stock of the McKeon Drilling Company which was placed in escrow with Shingle, Brown & Company as escrow holders, I had personal charge of that stock. When I received the stock I received it with a letter of instructions as to what should be done with it, which is in evidence, and bears date of October 26, 1928, being Exhibit 98. When I received this exhibit I received shares of stock representing 3,400,000 shares of common stock and 940,000 shares of preferred stock of the Italo Petroleum Corporation of America, which I subsequently had transferred into the name of the McKeon Drilling

(Testimony of L. J. Byers)

Company. After that it was kept in Shingle, Brown & Company's offices as an escrow, pursuant to and subject to the instructions contained in the letter Exhibit 98.

I received Exhibit 105 in San Francisco and prepared the receipt which is in evidence and marked Exhibit 41, bearing date of April 15, 1929. I personally dictated that receipt.

The same is true with reference to Exhibit 108. The language in the receipt, Exhibit 41, is taken practically word for word from the instructions, Exhibit 108. I distributed the stock in accordance with those instructions. I am reasonably sure that I prepared the majority of the receipts and made the distribution of stock from that escrow in accordance with the written instructions.

I prepared Exhibit 123, addressed to the McKeon Drilling Company, and signed and certified to it, and it discloses the distribution of the McKeon escrow stock with Shingle, Brown & Company up to April 26, 1929.

I recognize all of this correspondence between Shingle, Brown & Company and the McKeon Drilling Company relative to the payment of stamp taxes on stock transfers. I received the letters included in Exhibit 111 and replied to them as is disclosed by the other exhibits. I received Exhibit 115, referring to the same transaction, and I carried on this correspondence with Mr. McKeon or Mr. Thackaberry respecting those transfer taxes.

Exhibit 117 is signed by me. I do not recall ever having called Exhibit 116 to the attention of Mr. Horace J. Brown, to whom it is addressed.

(Testimony of L. J. Byers)

With respect to the custom and practice in the office of Shingle, Brown & Company as to the handling of correspondence and obtaining the O. K. of any of the partners of the firm to any matters expressed in correspondence, there was a considerable lot of documents and correspondence that would have to be taken up with one of the four partners each day, and I personally handled most of that kind of transaction. This particular letter here covers the payment of $400 for revenue stamps on a bill of nine hundred odd dollars, and they had requested us to collect the balance from other parties. I would take this sheaf of correspondence and a lot of other stuff that I might have that particular day to the first available partner and discuss it with him and have him O. K. it and that would be the end of it. 99 per cent of the business transactions in the brokerage business is verbal.

With respect to obtaining any written O. K. from any members of the firm with respect to any financial transaction, I would have them O. K. the document or the letter. I remember the particular transaction referred to in Exhibits 116 and 117, but I do not remember discussing it with anybody.

I heard the testimony of Mr. Shingle with respect to Exhibit 116, and his testimony as to the conversation that he had with me respecting it. I have no definite recollection of discussing it with Mr. Shingle, but I did reply to the communication Exhibit 116 as is disclosed by Exhibit 117. I met Mr. Fahey and Mr. Marles, Post Office Inspectors, in Mr. Jones' office in the Hunter-Dulin Bldg., in San Francisco in the spring of 1931, and at that time Mr. Jones gave me instructions in the presence of the

(Testimony of L. J. Byers)

Inspectors to deliver to them any records that we might have in the office, and if I could assist them in explaining them or any of the details, I was to do so, and I did so.

CROSS EXAMINATION

At the time the post office inspectors went up there I do not know whether Mr. Brown had the McKeon escrow records in his office or not. I don't know of my own knowledge whether all the records were turned over to the post office inspectors or not. In connection with my duties as an employee of Shingle, Brown & Company, I kept the records of the syndicate and am familiar with the transactions between Fred Shingle as syndicate manager and these various pools that were formed. I know that while Fred Shingle was syndicate manager he entered into an agreement with these various pools to sell the various pools stock that he held as syndicate manager. Shingle, Brown & Company, as members of the various pools, had receipts of a great deal of money from the pools.

Q And isn't it a fact that from the pool operations they received as profits over and above the cost of the stock to the pool and over and above the expenses of the pool itself, that they received some $84,000 out of it?

MR. SIMPSON: Objected to as calling for an opinion and conclusion of the witness and not the best evidence. If there is a documentary exhibit the witness should be shown that and interrogated as to what the various entries thereon mean and what they are.

MR. WEST: We make the further objection that it is hearsay as to any of the other defendants outside of Shingle, Brown and Jones.

(Testimony of Horace J. Brown)

THE COURT: Overruled.

MR. SIMPSON: Exception.

A Shingle, Brown & Company were participants in the various pools. Now, at the consummation or liquidation of those particular pools, the funds or residue left in there would be divided pro rata among the various members, and Shingle, and Brown being members of these various pools would have a certain amount coming from them. Now, what the aggregate is I could not tell you unless I saw the record.

THE COURT: If you want any further information from Mr. Shingle, you can further cross-examine Mr. Shingle.

MR. REDWINE: Well, I don't believe Mr. Shingle kept the records.

THE COURT: Well, Mr. Shingle can go and look at his records. They are his own records and he can understand them. Any witness from the witness-stand must be in a position to understand his own records. That would never be indulged for a moment. . Go on.

HORACE J. BROWN,

called as a witness in his own behalf, testified under oath as follows:

I live in San Mateo, California, and am 50 years old. I was born in Minnesota, and came to California in 1887, and attended school in San Diego. After leaving high school there I became employed by the San Diego Sun in newspaper work, until about 1905. I left there as a reporter, and went to Fresno and started a newspaper for Mr. Scripps, and remained in Fresno for about two years.

(Testimony of Horace J. Brown)

From Fresno I went to Sacramento and became editor of the Sacramento Star, another Scripps paper, and remained there until about 1909. Then I went to San Francisco and became editor of the News, and remained in the newspaper business in San Francisco until 1914. Then I became Chief Deputy Commissioner under Mr. Carnahan in starting out the Blue Sky Law. I remained with the Corporation Department as a deputy about three and a half years, and then became manager of the Marchant Calculating Machine Company in Oakland for about a year, and I then joined Mr. Shingle in the brokerage business, and we started the firm known as Shingle, Brown & Company about the middle of 1919, and I remained with that firm until we closed our business in 1930.

Mr. Jones joined the firm of Shingle, Brown & Company about two or three months, and Mr. Mikel about one year, after we started the business. The firm remained a corporation until the partnership was formed in 1929.

I have a wife and two children who reside in San Mateo.

I was never at any time an officer or director of Italo-American Petroleum Corporation or of Italo Petroleum Corporation of America or of the Brownmoor Oil Company or of the McKeon Drilling Company or of the corporation known as John McKeon, Incorporated, and I never at any time had any access to or any knowledge of the entries contained in the books of account of the McKeon Drilling Company, the Italo Petroleum Corporation of America, the Italo-American Petroleum Corporation or

the Brownmoor Oil Company, and I never directed or authorized anyone to make any entries in any of the books of account of those firms.

With particular respect to the testimony that has been given here as to certain yellow sheets of paper in the handwriting of Mr. Edgar P. Lyons, a former defendant in this action, as to the set-up on the books of the McKeon Drilling Company of the receipt of 2,000,000 shares of the capital stock of the Italo Petroleum Corporation of America by the McKeon Drilling Company, I had no knowledge of and did not direct the entries of any of those matters in the McKeon Drilling Company books.

I first met Jack McKeon about four or five years prior to this transaction. I first met Mr. Wilkes in the latter part of April, 1928, in my office. Mr. Shingle introduced me to Mr. Wilkes and Mr. Vincent at the same time, and that was the first time I had ever met Vincent. At that time I had a conversation with Wilkes, and Vincent in the presence of Shingle. The purpose of their visit was as to whether or not we would become interested in the financing of the Italo Petroleum Corporation of America, which they stated had recently been formed to take over the assets of the Italo-American Company, that they had made application for a permit to the Corporation Department to sell some 300,000 units of stock, and wondered if we would be interested in joining Vincent in doing this job. They indicated they hoped to acquire additional properties, develop additional properties, and indicated somewhat what their properties were at that time, including a 10-acre lease on Signal Hill, which they stated the Con-

tinental Oil Company was drilling on to the deep sands, and also a dehydrating plant at Long Beach. I do not recall any conversation respecting the Brownmoor Oil Company.

I told Wilkes and Vincent that we were not at all interested in the initial financing of a new company, that was not on a stabilized basis.

When we started in business it was known as an investment banking business, buyers and sellers principally of different issues. In 1926 or 1927 we became members of the Stock Exchange, and our business varied as business generally varied. We were largely underwriters of bond issues and stocks, preferred stock, which we bought outright for the most part, and which resulted in sale at either a profit or a loss. We never at any time handled any transactions involving the initial financing of oil companies or any other kind of company.

Two or three days later I saw Wilkes and Vincent in my office, Mr. Shingle being present, and had a conversation with them at that time. They indicated they wished to buy the Brownmoor Oil Company or its properties, and stated that they didn't know how fast Vincent would be able to sell stock under the new permit which they were acquiring; that they thought they might need $75,000 to $100,000 in order to make this deal, that is, the Italo Company needed it, because if this property was to be acquired it was subject to certain indebtedness, and the company needed the money to meet the indebtedness. Before they would make the deal they wished to know whether we would arrange to loan $75,000 to $100,000

to the company. We wanted to know what it was all about, and what we would receive for it. They indicated if we made the loan that they would put up as a bonus for the loan to the company 80,000 shares of Brownmoor stock; further, that Vincent was particularly anxious to make this deal because he was acquiring Brownmoor stock from various parties which he hoped to make a profit on if the deal went through, and if we would make this loan or handle this loan which would enable the company to make the deal, that Vincent would cut us in on a share of his profits. The general conversation related to the property itself, and was substantially this: that the Brownmoor Oil Company owned a full section lease on the Kern Front which they believed to be very valuable; it had some producing wells, on shallow drilling, and also had a refinery at Long Beach, which I believe at that time was leased out under an apparently profitable basis; that they said they thought it would be a good deal for the company. Nothing was said in that conversation that I recall relative to securing the payment of the $80,000 or $100,000 loan if it should be made. We said we might make the loan as individuals and might invite our friends in and form a little pool or syndicate, and wanted to know what security they had. They referred to their previous conversation, relating to the 10-acre lease on Signal Hill and the dehydrating plant that they owned at that time. I told them, I think, at that time that I would look into it further and give it some consideration, and that we would let them know very shortly whether we would go into the deal.

With reference to the adequacy of the security, I took that up the next day with Mr. Wilkes and Ward Sullivan,

(Testimony of Horace J. Brown)

the attorney for the company, or Mr. Melvin. Wilkes showed me some records of what the company was doing, showing they had two producing wells in which they had a half interest, in addition to the deep drilling going on. I think the two wells were producing about two or three hundred barrels of settled production. The oil at that time on the settled production was worth anywhere from 800 to 1200 a barrel settled production, with 100 to 150 barrels on their own account. Their interest in the property was worth at least $100,000 to $150,000, and had some value further because it was being operated with gathering lines at 10 cents per barrel.

I reached the conclusion that the offered security was adequate for a loan of $75,000 to $100,000.

In the early part of May I had another conversation with Wilkes and Vincent, at which time we told them we would make the loan and probably form a syndicate for that purpose among our own friends. The loan was to be for $80,000. They had indicated the loan would be paid off in three to six months, and I told them they had better take plenty of time, because if Mr. Vincent couldn't sell the stock fast enough to repay the loan, which was practically the only source of revenue at that time, that they didn't want to be caught in a jam, and furthermore they indicated they needed the money for the drilling program on the Kern River front, so I suggested that they make it three, six, nine and twelve months, which was done, according to the agreement. I further stated we would make the loan only on the condition that they secure the permit from the Corporation Department to sell this

stock, otherwise I didn't know how we could get it back, all of which was agreed to.

In these conversations they stated that they had some little revenue, that they would have some from the Brownmoor property, from the Kern River front, which they indicated at the time they had contracted with the Standard Oil Company at around 75 cents a barrel, and some revenue from the dehydrating plant and from the Hill, but their principal source of revenue for repayment of that loan and purchasing the property would be from Vincent's stock sales, and Vincent at that time indicated he was entering into an underwriting contract with the company to sell the stock, in which his minimum obligations provided for $15,000 a month. If he sold more, of course, he had all of the stock to sell his obligations in order to hold his contract were only $15,000 a month. In these conversations it was indicated that Vincent was putting up the 80,000 shares of stock bonus for the making of the loan. He said he had the stock. Around the 1st of May we advised Vincent and Wilkes that we would make the loan to the company. That was prior to the preparation of any written agreement respecting the loan.

Around the 1st of May I had a conversation with Mr. Wilkes in the presence of Mr. Shingle, in which Mr. Wilkes said that he had a chance to pick up a lease down by Santa Maria, which was costing $10,000, and that Vincent was willing to lend $5000 if we would lend the other $5000. I asked him what security we would have for the loan, which he indicated was rather preliminary in character to the $80,000 loan. He said he would put the

(Testimony of Horace J. Brown)

lease in Fred Shingle's name, and I said that would hardly be collateral for the loan because we assumed to be buyers of a lease we never saw. Then he said he would get 80,000 shares of Brownmoor from Vincent, being the stock that was to be a bonus on the contract, which would be as security. We said all right, and Vincent sent his check for $5000 and we made the loan of $10,000, by adding $5000 to the Vincent $5000. We received the 80,000 shares of Brownmoor stock as collateral for the loan. Our books show it was in four certificates. I do not recall ever having seen Exhibit 141. The check for $5000, part of Exhibit 158, dated May 16, 1928, payable to Shingle, Brown & Company, was the repayment to Shingle, Brown & Company of their portion of the $10,000 loan.

The lease just referred to was known as the Cat Canyon lease, and was placed in the name of Fred Shingle as collateral for that loan, and it was later retransferred to the company upon its request. The 80,000 shares of stock was collateral for the $10,000 loan at first, and later became the security for the $80,000 loan, after the repayment of the $10,000 loan.

Exhibit 238, the loan agreement between Fred Shingle and the company, was drafted by Melvin & Sullivan, counsel for the company, and submitted to our own counsel, Mr. Elkus, as was also Exhibit 142, the agreement between Fred Shingle and the subscribers to the syndicate.

In these conversations with Wilkes and Vincent respecting the $80,000 loan, nothing was said about Italo Petroleum Corporation of America putting up the 80,000 shares of Brownmoor stock as bonus. We were told that

the stock was coming from Vincent's office; whether it was from him and his associates or others interested with him, I do not know.

It was thereupon stated by the District Attorney that there was no question but that the security referred to in the agreements was deposited as security for the $80,000 loan, which included the real property or leases.

We were not advised as to the basis of exchange of the Brownmoor stock for the Italo stock or that it was up on the basis of 10 shares of Brownmoor stock for 6 units of Italo stock. We understood that the 80,000 shares of Brownmoor stock was to be exchanged for 40,000 units of Italo stock.

With reference to Exhibit 142, the $2500 subscribed by me was not put up by me. At all times I was prepared to put up the $2500 if I was called upon to do it. The handwriting opposite my signature on Exhibit 142 is mine, as is also the handwriting opposite the words "Rossiter L. Mikel" and "Axton F. Jones," stating "Paid, Perata." About the time the syndicate was being closed, various people came in and wanted in, so my subscription went to Mrs. A. G. Wilkes, O. B. Wilkes, who desired to pay her money for it and did so. The Jones and Mikel subscriptions for $2500 each went to Perata, who desired in, and that is why I wrote the pencil memorandum on Exhibit 142. The Mikel and Jones subscriptions were paid for by Perata, and my own subscription by Mrs. Wilkes.

With reference to Exhibit 299 and to line No. 4, which recites "Bonus given to members of the $80,000 syndicate, Horace J. Brown, 1250 units," I received that stock and

(Testimony of Horace J. Brown)

endorsed it over to the persons entitled to it, but did not retain it. That stock was contained in certificate 942, part of Exhibit 37.

The same is true with reference to lines 6 and 5 of Exhibit 299, showing 1250 units of stock going each to Jones and Mikel. That stock was delivered to the persons entitled thereto, and was not retained by Mr. Jones or Mr. Mikel. The endorsement on the Jones certificate was signed by me. Upon the repayment of the $80,000, Mr. Shingle notified everybody the loan had been repaid and he was holding their stock, and he sent a check for the subscription. I did not receive the stock representing the subscription of Mikel or Jones, but assume it was turned over to Perata in the regular course of business. We were probably engaged ten or twelve days in raising the $80,000. We called up our friends and asked them if they wanted to take a little flier in something that looked interesting. There was nothing whatsoever said in the conversations with Vincent or Wilkes to the effect that the loan would be repaid by May 22, 1928. Mr. Vincent told me after the loan was made that he was having an unexpectedly successful outcome with his sales which he had not anticipated, inasmuch as he was required to pay only $15,000 a month to the company, and with the announcement of the Brownmoor deal that the stock was selling very rapidly. Wilkes also told us that Vincent had been turning money in to the company very fast, so that the loan would be paid off very shortly, because he saw no sense of having a loan out if it wasn't required. It was a complete surprise to us.

(Testimony of Horace J. Brown)

After the loan was repaid, almost immediately, we had a number of conversations with Wilkes and Vincent, and Wilkes told us that numerous properties were being offered to the company at what he considered an advantageous price, and they thought it would be a good thing for us to consider whether we would head a further syndicate for the purpose of aiding the company in purchasing these properties. There were various discussions toward the end of May and up to the middle of June, various properties being considered. Wilkes told us he was negotiating for the McKeon properties, the Gilmore Oil Company, the L. T. Edwards property, a number of properties in the San Joaquin Valley around Coalinga. These conversations extended over a period of probably three weeks.

At the time the check for $83,000 was delivered to us, June 11, 1928, we were discussing the formation of another syndicate to take in additional properties. I saw Mr. Vincent hand that $83,000 check, Exhibit 149, to Mr. Shingle, about the date the check bears. Vincent came in and laid the check on Mr. Shingle's desk and said, "I told you boys I would cut you in on my deal and here it is." Mr. Shingle expressed some astonishment at the size of the check, and Vincent said he had had a very successful deal, thanks to us, and also he was very happy to become more closely associated with the company. I had a number of conversations with Vincent later, in the next two or three years, and he was very proud of the $83,000. Generally he talked considerably about what a nice piece of money he had made for us boys, these statements being made at the club and at various places, and

(Testimony of Horace J. Brown)

I finally told him that what he ought to do was to talk to us in the office and not get foolish over personal transactions.

About the time the postoffice inspectors were engaged in an investigation of this case, I went to Frederic Vincent and asked him what this deal was all about and whether he had ever made any accounting to us, because I wanted to know what the thing was so I could explain it. He said, "There is no necessity of you knowing anything about this deal at all, it is a deal between broker and broker. You had a perfect right to receive the money and I had a perfect right to give it to you."

I first saw Exhibit E, the pencil memorandum written by George Stratton, about a year and a half ago. It was found in a bound volume of appraisals, and meant little to me except it showed Shingle-Brown profit $83,000, so I assumed it had some significance in connection with the Brownmoor case, of which I had known nothing up to that time.

I first saw a copy of Exhibit 171 when it was given to me by Mr. Wilkes in January 1932, at the time of the arraignment in this case, and Mr. Wilkes gave me a copy of the letter that he had found in his files and said, "Perhaps that will assist you in straightening this thing out in your mind in finding what it is about." After the receipt of that letter from Mr. Wilkes, I made an investigation for the purpose of endeavoring to ascertain what those 230,000 units of stock appearing on Exhibit 299 in line 11 was. I asked Jones and Byers to make an examination

(Testimony of Horace J. Brown)

of Shingle, Brown & Company records to ascertain whether the 230,000 units of stock had ever been received, and they told me they could find no trace of it.

Thereupon the witness stepped to the blackboard and wrote a chart thereon as follows: "1,000,000 shares of Brownmoor equals 600,000 units of Italo. 400,000 shares of Brownmoor equals 240,000 units of Italo, Siens, Shores and Westbrook stock. 200,000 shares of Brownmoor stock (Cooper), 250,000 shares of Brownmoor stock (E. M. Brown) equals total 450,000 shares Brownmoor stock, equals 270,000 units Italo stock. 50,000 shares of Brownmoor stock equals 30,000 units Italo stock held by Siens and his associates. 100,000 shares of Brownmoor stock (E. M. Brown or Cragin) equals 60,000 units Italo stock. The total of these figures equals 1,000,000 shares of Brownmoor stock as the equivalent of 600,000 units of Italo stock, all of which Frederic Vincent & Company had contracted to purchase according to the exhibits in evidence, excepting the 50,000 shares of Brownmoor stock held by Siens and his associates.

I never had any understanding, written or verbal, with Frederic Vincent or George Stratton for the sale to them of the 230,000 units of stock shown on Exhibit 299. We never owned any stock to sell them. I never saw the four stock certificates issued in the name of Fred Shingle and endorsed by him, part of Exhibit 37, until after the return of the indictment in this case.

The checks for $83,000, part of Exhibit 149, for $24,750, and for $44,092.90, were never received by Shingle, Brown & Company or by me in payment for any of the Italo Petroleum Corporation of America stock that

(Testimony of Horace J. Brown)

comprised the 230,000 units just referred to. If it had been in payment of stock it would have been set up on our books as such. It was a custom in our office and absolutely necessary in the conduct of our business to keep a complete record of the purchase and sale of securities and give a confirmation therefor, and neither Shingle, Brown & Company nor any of its members ever had any record of any accounting with Frederic Vincent & Company respecting this 230,000 units of stock. I was told that the checks for $24,750 and $44,092.90 were put in the account of David Garvey, but I do not know of my own knowledge what, if any, instructions were given by any person respecting the said checks. I had nothing whatsoever to do with the filing of the application to the Corporation Commissioner requesting permission to issue or distribute to the Brownmoor Oil Company or its stockholders the 600,000 units of stock.

After the $83,000 check was deposited in the Montgomery Investment Company account it became the property of the Montgomery Investment Company, which subsequently subscribed $30,000 together with $36,000 from Shingle, Brown & Company to the big syndicate. The first discussion relative to Fred Shingle becoming manager of a syndicate to be formed for the purpose of advancing money to Italo was in the early part of June. A syndicate I would say is simply a voluntary association of a few individuals for the purpose usually of performing one transaction only. It would differ from a corporate structure in that regard. A corporate structure is for a continuing business. It would differ from a partnership, because a partnership has unlimited liability. Ordinarily

in a syndicate the liability of its members would be expressed and limited to that, usually to the amount of money they advanced or subscribed.

I first met John Perata in the latter part of May and Masoni about the time the big syndicate was in formation. I met Westbrook a long time afterwards, Mr. Siens around the first of July, 1928, Robert McKeon in July, 1928, Raleigh McKeon in August or September, 1928, Maurice Myers in July, 1928, Bill Cavanaugh in May, 1928. Mr. Jones left on a trip around the world on June 1, 1928, and came back in the middle of September, 1928.

With reference to the big syndicate which was formed for the purpose of raising money to assist Italo in the acquisition of other properties, it was definitely understood with Wilkes and Vincent that Shingle, Brown and Company would not lend that amount of money for those purposes, because it calls for anywhere from one million to two million dollars, and we did not wish to undertake to raise that among our friends. Wilkes and Vincent said they would interest their friends in becoming subscribers to the syndicate, and that people close to the company and other friends of theirs they thought could raise the requisite amount of money, and we indicated that probably we could make good up around $100,000 of it. I think it was indicated that some of the officers or directors of the Italo Petroleum Corporation intended to become subscribers to the syndicate. At that time I did not consider that there was any impropriety in any officer or director of Italo Petroleum Company becoming a syndicate subscriber. If the people who were interested in the company's welfare were not interested in a syndicate designed

(Testimony of Horace J. Brown)

to assist the company in its future growth, I don't know how they could expect anybody else to come in, and that is what I thought about it at that time. The purpose of the syndicate as originally designed was to take title or options on all of these various properties that were being assembled together, turn them over to the company in exchange for 12,000,000 shares of stock, pay the amount of stock necessary to purchase these properties, that is, the stock considerations, and pay the money necessary to purchase them up to a certain amount. That proposal was changed by reason of the issuance of the permit by the Corporation Commissioner. Prior to the issuing of the permit, Fred Shingle as syndicate manager had advanced about $350,000 to the Italo Petroleum Corporation of America to assist them in the purchase of these properties. In undertaking this syndicate Frederic Vincent was very enthusiastic over the situation. He had sold the 300,000 units of stock authorized by the permit of May 10th very rapidly. He had also handled this Brownmoor stock at the time, and early in June the company had issued some rights to its stockholders by which they were permitted to buy ratably 300,000 units of common and preferred in unit form. That had been taken up very quickly, and Vincent had no doubt at all about his ability to raise a very large amount of money in an orderly fashion. The purpose of the syndicate was to anticipate his take up of the stock. The purchase of properties required the payment of large amounts down and future payments from time to time. There was no way of ascertaining whether the stock could be sold fast enough by Vincent to meet these payments, in fact it was practically

certain that it would not. Therefore the syndicate would anticipate his ordering more of the stock. Prior to the time Shingle became syndicate manager, we understood that Fred Shingle or Shingle, Brown & Company were not to undertake to sell the Italo stock except as wholesaling it to Vincent & Company, or if another agency outside of his field should be found to sell to them wholesale purely without liability.

Before going into the final syndicate agreement we had numerous discussions with Vincent and Wilkes concerning the properties that the Italo Petroleum Corporation was proposing to acquire. Mr. Shingle came down to Los Angeles to talk to Jack McKeon about it, and on his return to San Francisco Mr. Shingle told me that he had had a long talk with Jack McKeon, in whom he had a very great confidence, and that Jack considered it a particularly favorable time to pick up producing properties, particularly of the character which they were picking up here in the basin, that Signal Hill production was naturally running down although they had found deep sands shortly before, but naturally that would exhaust itself in time; that the light oil production stuff was decreasing in a general way. It was a very good time to pick up these properties, because he considered that the value of oil would increase, that a producing unit would be of very great effect in this State and have a chance to make a big oil company; that he considered the properties were being purchased cheaply; that if a deal was made respecting the McKeon Oil Company, he expected to turn it in at a fair price.

(Testimony of Horace J. Brown)

This trip of Shingle to Los Angeles was about the 10th of June, 1928, and I believe that because the first $225,000 was sent down *down* on the 19th of June, and that was not raised over night. During the time that this investigation was going on and these properties being discussed, matters were in a state of flux in the early days, some of the properties were under negotiation or some under contract. There was a change probably every day, considering whether the property could be obtained at a fair price or not. Under the terms of our syndicate agreement we had a right to advance four or five hundred thousand dollars to the company in the form of stock so that if the deals did not go through we would become a creditor of the company in that amount.

Exhibit 227, dated June 19, 1928, is a memorandum of the $225,675.00 deposited by Mr. Shingle as syndicate manager with the Bank of Italy, for the account of the Italo Petroleum Corporation of America. By referring to this form of June syndicate agreement with my handwriting thereon, I now recall that the original list of properties which the company proposed to acquire was limited to the Modoc Petroleum Corporation, McKeon Drilling Company, L. T. Edwards, Coalinga Empire, Zier Oil, Premier Oil, and the Producers Oil Company. The changes as indicated here eliminated the Edwards property and substituted the Graham-Loftus, and also added the Pelham properties, Pennsylvania State, and Section Seven, and I believe that other properties were added later.

As the properties proposed to be acquired were changing, the amount of stock or cash necessary to acquire the

properties was also very materially changing. Some of the properties required additional stock beyond the original estimates, and the Graham-Loftus property called for the payment of $3,000,000 in cash. The other properties also required cash and stock. The original syndicate agreement was changed to provide for 12,000,000 shares of stock instead of 10,000,000.

Thereupon the following proceedings were had:

MR. SIMPSON: Your Honor, with respect to the testimony or questions that I expect to interrogate Mr. Brown about at this time, I think I should call the court's attention to the fact that in so doing we request the court, along the same lines that Mr. Carnahan requested the court when Mr. Shingle was on the stand,—we request the court at this time to interpret for counsel the indictment in this case, and such other pleadings or evidence as may be here, and advise us whether or not under the court's interpretation thereof Mr. Brown is in any way charged in the indictment with having had anything whatsoever to do with the negotiations for or the execution of the contract between the McKeon Drilling Company and the Italo Petroleum Corporation of America, which is in evidence as Exhibit 44, or anything to do with the filing of the application with the Corporation Commissioner for the issuance of the permit as part of which permit stock was to be issued to the McKeon Drilling Company as part of the consideration for the acquisition of the McKeon Drilling Company properties, or any matters alleged in the indictment, or therein referred to, with respect to the so-called agreement or ar-

(Testimony of Horace J. Brown)

rangement, secret or otherwise, with respect to the stock to be issued by the Italo for the McKeon or other properties, or to any other representation that may have been made to the Corporation Commissioner in filing that application, because it is our understanding, and always has been, that neither he nor Mr. Shingle nor Mr. Jones are charged in the indictment or are shown by the evidence to have had knowledge of or to have participated in any of these transactions. However, we do not desire to waive any rights or in any way prejudice Mr. Brown by having him refrain from giving testimony upon those matters, if he is charged with respect thereto in the indictment. It is the same matter that we had before the court the other day, and I make the request at this time for the court's interpretation of those matters for counsel, so that if I do proceed with that line of interrogation, as to all the testimony to be produced from this witness thereafter it is distinctly understood that we are doing so reserving all objections that we have heretofore made to all testimony respecting those matters, and without waiving any of those objections.

THE COURT: Well, my view has not changed since that announced to Mr. Carnahan.

MR. CARNAHAN: This suggestion, your Honor, which Mr. Simpson has made is, of course, to protect us on any waiver of our rights. May we have the understanding that your Honor's ruling with respect to it is the same as on my suggestion, so that we may have an exception?

THE COURT: Yes, let it take the same course. I don't recall how that was handled.

(Testimony of Horace J. Brown)

MR. CARNAHAN: The suggestion is made so it will be clear that we are not waiving any rights.

THE COURT: Yes.

MR. SIMPSON: Yes, I think the substance was at that time that the court refused to explain his view of the matter, and that we should proceed without waiving any objections.

Q In that same understanding, then, I will call your attention to Exhibit 44 in evidence, which is an agreement made July 5, 1928, between McKeon Drilling Company and the Italo Petroleum Corporation of America. I will ask you whether or not you had anything whatsoever to do with the negotiations for or execution of that contract.

A Nothing whatever. It was indicated to me what the approximate set-up would be subsequent to that date, that is, as to the amount of money that would be required, and the amount of stock, and what the general set-up would be.

This statement entitled "Summary of cash obligations under contracts for properties and interests acquired by the Italo Petroleum Corporation," was furnished to me about August 30, 1928, by Mr. Myers, of Spalding & Myers, attorneys for the company.

The document was received in evidence and marked Exhibit MM, and is a summary of the cash obligations of the company under contracts for properties and interests acquired by Italo Petroleum Corporation. It was thereupon stipulated by counsel for the defendant Myers that he prepared Exhibit MM.

(Testimony of Horace J. Brown)

With respect to the issuance of the permit in evidence, whereby 7,500,000 shares of common stock and 4,500,000 shares of preferred stock of Italo Petroleum Corporation of America were issued to Maurice C. Myers as trustee, to be used in the acquisition of various properties, including the properties of the McKeon Drilling Company, I had nothing whatsoever to do with the filing of the application for that permit. Prior to the issuance of the permit on August 9, 1928, I had a conversation with Mr. Friedlander, the Corporation Commissioner, with respect thereto. That was about ten days to two weeks prior to the issuance of the permit, in San Francisco, in Mr. Friedlander's office, in the presence of Mr. Bradford Melvin, counsel for the company. Prior to this conversation I received a telephone call from Mr. Wilkes at Los Angeles in which he said he had been racketed down here, that some people down here were trying to hold him up for a large amount of money in Los Angeles, sixty or seventy thousand dollars, in connection with the issuance of this permit, and he asked me what I thought should be done about it. I told him I would get in touch with Mr. Melvin, counsel for the company, and we would consider the matter. I discussed the matter with Mr. Melvin and we went to see Tom Finn, the former sheriff of San Francisco, and Al McCabe, the former secretary to the Governor, and asked them what they knew about the background of Mr. Friedlander, and whether there was any justification for such a racket down here. We saw these men separately, and both of them informed us.

An objection was interposed, whereupon the court stated, "Well, he went to Tom Finn and wanted to know if the

(Testimony of Horace J. Brown)

Corporation Commissioner was up to any such tricks as that."

We went to see Mr. Friedlander and had a conversation with him. I told Mr. Friedlander what Mr. Wilkes had said to me about him, over the telephone, as I have just testified, and also told him substantially this: that if such a situation existed, or was even reputed to be existing, it cast a cloud on his department and only two conclusions could be reached, one, that in the opinion of other people he was personally crooked, or that his friends were selling him out, and I told him we were interested in the syndicate in connection with this operation and we didn't want to be connected with anything of that sort. He said, "Of course, you can't help what people say," and that he would investigate the matter when he got to Los Angeles; that permits were not for sale in his department and that I knew it. That was the substance of the conversation. I never heard anything about it at any subsequent time. The next thing I knew was that the permit was issued.

I am familiar with Exhibits 83 and 84. The signature on Exhibit 83, "Shingle, Brown & Company, escrow holder, by Horace J. Brown," is my signature. Subsequent to the execution of Exhibits 83 and 84, an agreement was entered into with Frederic Vincent & Company by the terms of which he was granted an option for the purchase of 500,000 units of Italo stock, which is Exhibit 161. The price of $2.00 gross per unit provided for in Exhibit 161 was about the price they were selling the stock for at that time. The sale price of the stock to Vincent & Company was $1.60 per unit net to the com-

pany. The members in the pool subsequently organized did not sell units. That was divided the $1.60 in our subsequent negotiations with Vincent, where odd lots were made one way or the other, by which he paid $1.03 for the common stock and 57 cents for the preferred. In the preferred options with the pool members the first 500,000 shares of stock was fixed at the same price, $1.03 for the common. The remaining shares after that were stepped up 5 cents per share to the pool members, so that after the option to the pool members for the first 500,000 shares, the pool members were required to pay a higher price for the stock than Vincent & Company was required to pay.

The requirement in Exhibit 161 that Vincent and Company should sell 300,000 units of Italo stock on or before the 15th day of September, 1928, was inserted therein because the arrangement for the purchase of the Graham-Loftus properties called for the payment on September 20th of approximately $640,000 or $650,000, and therefore a large amount of money would be necessary at that time. Under the option agreement Vincent had, Exhibit 161, he would have paid to the syndicate manager $480,000 by September 15, 1928.

I was in Los Angeles about September 18th or 19th, 1928, and participated in some of the transactions with respect to the borrowing of money from the Farmers & Merchants National Bank. About that date we had this large amount of money coming due on the Graham-Loftus properties under the escrow at the Bank of America. On that morning we were scrambling around trying to find out how to get the money to make the payment, and

there was a feeling it could be postponed a few days. On the morning of the 20th, when all of this money was due, came the word they had brought in the Lightner well, making four or five thousand barrels, and there was a grave concern at that time whether the Graham-Loftus people would continue to give us any continuance whatsoever. Things were really in a very desperate and serious state. I had a meeting with Mr. Wilkes, Jack McKeon and Gordon, and one or two others, and we had several conversations respecting the situation. Jack McKeon and Fred Gordon said they would go to the Farmers & Merchants National Bank and see if $300,000 could be borrowed, if that would satisfy the Graham-Loftus people for a time until further payment could be made. They returned and said it could be done, and on the basis of a note signed by the syndicate manager, endorsed by the company, and with a million units of stock put up as collateral. I told them that would be satisfactory except for one thing, that we must have a guarantee of Mr. Gordon and Mr. McKeon that we wouldn't be held liable in case anything went wrong on the loan, because I doubted whether we actually had authority to put up the million units. They were willing to make such guarantee and did make it. I wired Fred Shingle to send down the notes and deposit the stock with the Wells Fargo Bank & Union Trust Company. In the meantime we borrowed from Myers, trustee, a million units of stock and put it up with the bank until the matter was closed. At about that time I had a discussion with Robert McKeon with respect to the McKeon Drilling Company pulling out of the deal, by which they were selling their property to the Italo,

(Testimony of Horace J. Brown)

and he was not eager to go into the deal at all and wanted to pull out; he felt he should get some money if he was to sell and he hadn't got any money. I communicated that information to Mr. Wilkes by telegram. This is the copy of the telegram I sent to Mr. Wilkes and his reply.

The telegrams were received in evidence and marked Exhibit NN, and are in substance as follows:

Telegram dated September 14, 1928, from Horace J. Brown to Alfred G. Wilkes in Chicago, as follows:

"Matters very serious here with 900,000 due by 20th and Bob seriously threatening to pull out. You must decide whether you are more needed there or here to get extensions."

Copy of a reply dated September 16, 1928, to Brown from Wilkes as follows:

"My opinion most important thing is to pay Bob McKeon 100,000 Monday. Feel sure we can handle Graham-Loftus by making most payment on Thursday."

When I refer in that telegram to 900,000 due by the 20th, I presume that amount was due. There was over 650,000 due on the Graham-Loftus alone. The person referred to in the telegram as "Bob" seriously threatening to pull out refers to Bob McKeon and the McKeon Drilling Company. The references in Wilkes' reply telegram refer to increased syndicate subscriptions.

When this loan was negotiated with the Farmers & Merchants National Bank, I had a conversation with John McKeon relative to Shingle, Brown & Company becoming

interested in taking charge of the sales of Italo stock. That was after Mr. Lacy and Mr. Gordon had gone and borrowed another $300,000 for the company, which I understand Jack McKeon also endorsed. I had one or two conversations at the offices of the company and I think probably one or two at the Biltmore Hotel with Jack McKeon. Wilkes was also there. The effect of the conversation was this: Jack said, "Now, look here, I have taken off my coat and I have put my name on $600,000 worth of paper. I am going forward in this deal now and our properties are going in." Of the first $500,000 due them in cash they were putting $250,000 into the syndicate. He said, "I am going to take off my coat and it is about time you fellows took off your coats now and went forward and pulled this thing out. You have got to help me." He said, "As far as the McKeon properties are concerned, you can depend upon them going in," that he had talked to Bob about this thing, that it was moving forward, and he wanted this thing to go into an oil company, and he thought it would, into a big one. He also said, "You have also had an opportunity now to see how this situation was getting together. For the first time we have been given a financial statement of the company, of its earnings. We have been shown the compilation of Abel and the various appraisers." He said, "I think you will see that this is good enough for you to interest yourselves in it and your friends," and asked us if we could not interest a group of reputable brokers in this concern, enough to pull it through. Incidentally, he said if we could do so he would see that we were not sorry for it.

(Testimony of Horace J. Brown)

I told Mr. McKeon I would take it up with Fred Shingle when I got back to San Francisco.

When I stated in relating that conversation about the valuation report, I mean that I was shown the Starke and Thompson appraisals of the properties, or outlines of them, and I also saw Mr. Abel's compilation in the Corporation Commissioner's file, giving the valuation placed on the properties by the various appraisers. That compilation prepared by Mr. Abel of the State Corporation Department shows total lowest values, probably placed upon the appraisals, of $18,847,000, which were to be acquired subject to a debt of $2,750,000, leaving net valuations of about $16,000,000. The earnings statement that I referred to was the one prepared by the firm of Wunner, Ackerman & Sully, which appears as part of the Corporation Commissioner's file, together with a pro forma balance sheet. I was furnished with a copy of the original balance sheet and one of the original earning statements prepared by Mr. Sully, but I do not believe I ever saw Exhibit 249. I was handed Exhibit 00, dated September 19, 1928, prepared by Wunner, Ackerman & Sully, certified public accountants, showing that the total income from the properties of the Italo Petroleum Corporation of America for the month of July, 1928, was the sum of $354,182.67, which includes the properties acquired and being acquired under the August 9, 1928, permit.

Up to around September 20, 1928, I think the syndicate had raised and advanced to the company for the purpose of the company acquiring these properties something over $1,000,000. Before leaving Los Angeles I undertook to ascertain what moneys would be needed in

order to have the cash available at the times that it would be required to meet the purchase obligations of the company, and I prepared this longhand schedule showing the approximate time that payments would be due upon these properties, and I assume this was probably made about September 20th.

The schedule identified by the witness was received in evidence and marked Exhibit PP, and shows the stock and cash considerations being paid for the properties acquired by the Italo Petroleum Corporation of America, together with the dates that cash payments were due thereon.

Neither Mr. Shingle nor myself had anything whatsoever to do with the negotiations for or the making of the contracts for the acquisition of any of those properties. There was only one time that I ever entered into any discussion at all. I think I went over with Fred Gordon to a man named McQuirk, who was handling or dealing with the Modoc stock, and Gordon asked me to step over to see him, that he wanted to get an extension on some payments. That is the only discussion I had about any property. I had nothing whatever to do with the negotiations for any of the properties. The monthly payment on the Graham-Loftus property amounted to $166,666 plus interest, which made the payment due October 20, 1928, $176,418.00.

Upon my return to San Francisco I discussed with Fred Shingle the matters that I had discussed with John McKeon. Wilkes had had some conversations with Shingle relative thereto. The subject of the conversations was this, as to whether in our opinion the deal justified us in

(Testimony of Horace J. Brown)

getting together a group of brokers who would handle the thing as a purely stock exchange matter. Mr. Shingle had already conferred with some of his broker friends who he told me had already started their own investigation in the matter through their Los Angeles correspondents to see whether the thing interested them, and also was getting some figures up north. Our conversations with Mr. Wilkes were along the same lines, asking us if we would get together on this thing. He said if we would he would see that we were substantially rewarded somewhere along the line for our services, if we could pull this thing through. Mr. Shingle conferred with the brokers on the matter and I did the inside work. Shingle came down to Los Angeles with Plunkett, of Plunkett, Lilienthal & Company, and Miller of J. J. Meigs & Company, and upon his return to San Francisco I had a conversation with him. Before he returned he telephoned to me that they were very enthusiastic and intended to go forward immediately upon their return. Upon his return he told me what they had done, that they had gone into all of these figures and facts in the company's office, had talked to John McKeon, and were particularly enthusiastic over Mr. McKeon's leadership, and thought there was an opportunity to build up a very large producing company. One of the things that they particularly insisted upon was that Jack McKeon become head of the company, and that Jack McKeon had told them that he could not get away from Richfield until about the first of the year, but that he would eventually take charge of it; that there was a man down here named William Lacy, of whom I had heard before, and that he was particularly interested

in the company and had been interested in the previous oil matters with Mr. McKeon; that he, McKeon, would see Lacy to see if Lacy would take the presidency in the interim and later would go along with him, and either as president of the board or president Jack would take charge of the company. They also went to some extent, I believe, down here into the Trumble process and considered it had great opportunity for becoming something real. That is what they told me.

This group of brokers conducted their investigation or examination for about ten days or two weeks before they actually went into the deal, and around October 15, 1928, or shortly prior thereto they definitely agreed that they would go ahead with the matter. The brokers insisted that Frederick Vincent & Company be entirely eliminated. giving as the reason that there had already been a great many rumors around San Francisco that the stock was oversold because Vincent was not delivering the stock and Vincent was in a different business than we were, that is, I mean he was not a member of any qualified exchange, but sold stock entirely through salesmen and did not operate through the exchange and in the manner in which exchange members did.

About that time I had a conversation with both Vincent and Stratton relative to their option to buy the stock. As a matter of fact, they indicated their willingness to get out although they would like to remain in the pool with the other brokers. I explained to them, of course, that the other brokers would not stand for it and they could not perform any services in connection with it. Therefore it would be impossible. They were fairly willing to get

(Testimony of Horace J. Brown)

out and indicated that they had probably sold about all the stock that they thought they could in the manner in which they were selling it.

At the time of the cancellation of their contract on October 15, 1928, they indicated they were going to get out if we would cover the sales they had made. I asked them how many sales they had made and Stratton said they had sold about 100,000 units. We said we would take care of it. After this conversation we reserved about 120,000 or 122,000 units for Vincent, and gave an option for 2,500,000 shares of common stock to the brokers' pool, an option to Mr. Lacy for 100,000 shares, an option to the New York crowd, who had been trying to do some selling back there, in order that we might cancel their contract peacefully. On October 15 or 16, 1928, when we held out this 122,000 units for Vincent, we had substantially all of the balance of the 3,000,000 shares of common stock under option.

After the cancelling of the Vincent option on October 15, 1928, Stratton came to the office about October 18th or 19th and said that we had not reserved stock for them properly. I said, "What do you mean? I gave you what you asked for. You said you needed about 100,000 and we set aside about 122,000." He said, "Well, you have not taken care of our partial payment sales." I said, "Well, you have not told me about any partial payment sales. How can we do it? This stock is all under option and I don't know of anybody that wants to release any." The next thing I heard from him was from his attorney, Mr. McInerney.

(Testimony of Horace J. Brown)

As a result of these various conversations with Stratton and Vincent, and their attorney, Mr. McInerney, some figure was given to us as a preliminary figure of the amount of stock that Vincent & Company claimed they were short. This figure caused us to send an order to him to find out substantially what it was, so we finally wrote them a letter November 1st to settle this controversy that we would provide up to 400,000 units, we already having assurance from Jack McKeon that he would fill up the 300,000 units of vacuum to make the difference. This is the letter which I sent them at that time.

With reference to the assurance that I had received that the balance of the stock would be made up some place else, I had some telephone conversations and also had some conversation with Mr. Wilkes, who had gone down to Los Angeles to talk the matter over with Jack McKeon. As near as I recall, Jack McKeon said he would make the thing up and try to settle the thing in order to make the thing move forward. The situation was in very bad condition. If somebody threw a suit in there or attempted to enjoin the syndicate, we might as well quit right there. We had a lot of money to pay the next 60 days. In writing the communication which is Exhibit 120, to Frederic Vincent & Company, I had in mind the statement made by Mr. McKeon with reference to that.

This letter dated November 13, 1928, part of Exhibit 120, addressed to Robert McKeon, states that the syndicate only has 122,000 units to deliver to Vincent & Company, and that as soon as that is exhausted I will draw

(Testimony of Horace J. Brown)

upon the McKeon stock to take care of the stock that Vincent was demanding, and refers to the stock of the McKeon Drilling Company deposited with us in escrow on October 26, 1928, being Italo Petroleum Corporation of America stock. I think I received the escrow instructions from the McKeon Drilling Company after the deposit of that stock in escrow. And the request that the stock be placed in escrow was at the suggestion of the members of the pool, who wanted as far as possible to keep any large blocks of stock from coming on the market while we were marketing the stock. I discussed that matter with John and Robert McKeon in Los Angeles, and they were perfectly willing to deposit the stock in escrow. We were talking about escrow costs and what bank to put the stock in, and it was suggested by either them or myself that they deposit the stock with us for escrow without charge. These escrow instructions are Exhibit 98. It was necessary for us to call upon the McKeons to furnish stock to Frederick Vincent & Company because we did not have any stock to sell them beyond the 122,000 shares left in our account after making the other provisions for the other options. By that I mean that all of the remainder of the common stock was under option to the brokers' pool and to other persons.

After the formation of the brokers' pool it took the syndicate manager until About December 20th to fulfill his obligations and pay to the Italo Company or to Myers, trustee, the balance of the sum required under the contract. As a matter of fact, we were in position to do it somewhat before that time, but we had to adjust the account. Our agreement to the company was to provide

(Testimony of Horace J. Brown)

it with two to three and a half million dollars, so it would leave the company owing not to exceed $2,750,000 on the purchase account. It had to be adjusted between our auditors and theirs.

Two things happened with the formation of this pool. To begin with, the syndicate subscription had not been filled up very fast up to that time. I think we had something over a million dollars in it. As soon as they knew some of the brokers were going to take hold of it and handle it as a market transaction, everybody was rushing to get into the syndicate. We had more trouble keeping money out than getting money in. We finally chopped it off when we got to a million or eleven hundred thousand dollars. Also with the instance of Mr. Lacy and his friends going in and the pool entering into this situation, the stock started selling on a very highly speculative market. It sold pretty fast over a period there between October 15th and up to probably the 1st of December. I think the first pool handled something like over a million shares of common up to December 6th, I think it was, the date of closing. There was never at any time any secrecy about the fact that Mr. Shingle would be the syndicate manager or that Shingle, Brown & Company were members of this brokerage pool. We became members of the brokerage pool very largely because if it was not good enough for us to take hold of our fellow brokers naturally would not join, and we were also willing to do it because we believed the company had a great future.

The officers of the Italo Petroleum Company were well acquainted with the fact that Mr. Shingle, in addition to being syndicate manager, was also interested in Shingle,

(Testimony of Horace J. Brown)

Brown & Company, and that Shingle, Brown & Company was a member of the pool, and they were delighted that we were. In fact the officers of the Italo company insisted that we try to form the pool in order to save the situation.

With respect to the McKeon escrow stock and to the letters of instruction for its distribution, Exhibits 74, 107, 105, 108, 110, 112 and the others dated December 22, 1928, those were handed to me upon that date. All of those instructions are signed by the McKeon Drilling Company. Those instructions were handed to me by John or Robert McKeon on December 22, 1928, in Los Angeles.

After we started the pool, Mr. Wilkes, Mr. McKeon and others started talking to us about the formation of the big McKeon Oil Company, and when these were handed to me in the case of Mr. Perata, John and Robert McKeon told me they were giving the stock to Mr. Perata, because he was a former president of the company, that he had been shushed out to make room for William Lacy, and they wanted to hold his good will with a large number of Italian stockholders in connection with the formation of the larger company.

With respect to Exhibit 105, instructing us to deliver 62,500 units to Paul Masoni, John and Robert McKeon told me substantially the same thing as they did with reference to Mr. Perata, and that he would be moved out of the secretaryship before very long.

With respect to Exhibit 107, to deliver 25,000 units of stock to J. V. Westbrook, John McKeon told me it was

(Testimony of Horace J. Brown)

a personal matter between himself and Mr. Westbrook, and it had nothing to do with this matter; of the new company.

With respect to Exhibit 74, directing the delivery of 62,500 units of stock to Maurice C. Myers, Jack McKeon told me they desired to reward him, because they figured he had done work as an attorney way beyond any means to compensate him in cash. In fact, Bob McKeon had told me at least 60 days prior to that that he was going to take care of Mr. Myers, because he felt he had done a lot of work a long ways beyond what he could be compensated for.

With respect to Exhibit 109, directing the delivery of 30,036 shares of preferred and 34,362 shares of common stock to E. B. Siens, signed McKeon Drilling Company, Inc., by R. B. McKeon, they stated to me that the Siens stock had something to do with the personal relations between Jack and Siens; they were partners before, and as I understood it, in some large San Bernardino real estate transactions and also a breeding farm for breeding horses.

With respect to Exhibit 110, signed by R. B. McKeon, I received that at the same time. This communication authorizes the transfer upon the conclusion of the escrow for 961,000 shares to Fred Shingle. They told me this was directed to Shingle, and this stock was subject to the action of A. G. Wilkes in connection with the promotion of the bigger company, that it was to be at the direction of Mr. Wilkes as to what should be done with the 961,000 shares to be used in connection with

(Testimony of Horace J. Brown)

the bigger company; by that I mean the McKeon Oil Company.

After I received these exhibits I took them to San Francisco and deposited them with Mr. Byers, our auditor, to be held by him in connection with the escrow instructions of October 26, 1928. The escrow terminated January 24, 1929. On December 22, 1928, when I received these exhibits to which I have just referred, was the first time that I received any information whatsoever that any of the McKeon escrow stock was to be delivered to Myers, Westbrook, Masoni, Perata and Siens.

With respect to Exhibit 110, Mr. McKeon told me that while this 961,510 shares of common stock was to be issued in the name of Fred Shingle, it was to be held subject to the direction and control of Mr. Wilkes. With respect to Exhibit 110, the letter addressed to Alfred G. Wilkes and signed by Fred Shingle, there was no conversation in Los Angeles with Robert or John McKeon with reference to the Gordon and Shores account referred to in the letter. On December 24, 1928, we advised Mr. Wilkes that we had the orders over there for that stock. He said in connection with that that he was going to use the stock in connection with the promotion of the bigger McKeon Oil Company, in getting it together. We had some previous discussions and we talked about it later, and that he might want to give some of this stock to Mr. Gordon to keep him in line with the company. He had been vice-president some time, and also wanted to give a little to Mr. Shores, who was being shushed out of the company. At that conversation Mr. Wilkes, Mr. Shingle and myself were present.

(Testimony of Horace J. Brown)

Prior to the receipt of these distribution instructions, and in September, 1928, Vincent complained to me that sales were being made down in Los Angeles against his sales, and that he thought he ought to be protected as long as he was the exclusive agent for the syndicate in this State. I came to Los Angeles to look the matter up and found that Mr. Bentley personally was making sales short of stock he didn't have to deliver and there were complaints about it. I got in touch with Mr. Bentley, and talked to Gordon and Siens about it and strongly urged that it be stopped. Mr. Gordon suggested we furnish the stock in the syndicate, and I told him I thought that would be unfair to risk it at all; that they would have to do it some other way; so about the time we were settling up matters around the 15th of October it was indicated to me by Jack McKeon that he would furnish the stock from his stock which the McKeon Drilling Company was receiving for its properties, and I suggested that the matter be put in escrow at some bank so that the people who actually had bought and paid for the stock would be certain to have or receive it. As the result of that an escrow was created and the stock was deposited therein and delivered to the purchasers as it was paid for.

About the middle of October, 1928, when Mr. Lacy and the other members of the board of directors were elected, I had and was receiving statements of the auditors, including the earnings of the properties. I had a long talk with Mr. Lacy in San Francisco, on October 16th, the day he was inducted into office as president, and he was highly enthusiastic over the situation. He stated he had made an investigation of the company on his own

(Testimony of Horace J. Brown)

account, and likewise Fred Gordon, who was a vice-president of the company, and formerly vice-president of the California Petroleum Company. The picture was about this: The company, according to the statement of the auditors of the properties they were acquiring were earning about $354,000 a month in July; they had a production of thirteen to fourteen thousand barrels of oil a day, practically all light oil, in the Los Angeles basin, and some in the San Joaquin Valley. They seemed to have assurance of good management through Mr. Lacy. In addition to this it looked like an extremely interesting speculative picture for the development of an oil company of considerable size. As a matter of fact, I think at that time it was the 9th, 10th, or 11th in size in California as a producer of oil.

Shortly after October 15th when the company had been put in shape, Mr. Wilkes said he was going to devote practically his entire time from that time on to develop a larger picture with Jack McKeon, who intended to get away from the Richfield and was going to take charge of the company; that they wanted to form a large company which would be interesting to the eastern bankers. Early in November, 1928, I met Mr. DeShadney, the representative of the eastern banking group. Mr. DeShadney was connected very closely with Palmer & Company, a member of the New York Stock Exchange, and he informed me substantially as follows: that the eastern crowd were very much interested in financing a large producing company in the west headed by Mr. McKeon, if the properties could be gotten together in proper shape, to make a large picture for them, that they

would be very much interested. It would probably involve financing in a very large amount, maybe a total of twenty to thirty million dollars, handled with a good sized bond issue as a foundation and the rest would be handled by them as a stock matter. Both Mr. DeShadney and Mr. Wilkes, who were experienced in eastern financing, indicated to us that in order to put over a big issue in New York it would be important that they have coast distribution of it; that is always true, by the way, of eastern financing of western matters, that the local market should take a reasonable amount of the financing.

The discussions with Mr. DeShadney extended over the larger part of November, until he went east. I was told they were having negotiations between the east and the west from that time on, but I was not familiar with them.

With reference to the 122,000 units of stock that I have testified was set aside in the syndicate for Frederic Vincent & Company, Frederic Vincent & Company paid to the syndicate for more stock than the 122,000 units that had been set aside for them. They paid for approximately 41,000 units in addition, plus 20,000 shares extra of preferred stock, over and above the 122,000 units. Along early in December I first discovered that Vincent had actually paid to the syndicate for more stock than the syndicate was able to deliver to him. The auditor probably had not been accurately advised where to put the stop; it wasn't there, and he ran past the stop signal, so the syndicate was oversold above those options around 46,000 units, plus 20,000 shares of preferred stock, and when that was discovered we began drawing upon the McKeon stock by their direction and order, replacing the

(Testimony of Horace J. Brown)

stock of the syndicate and taking some $86,000 out of the syndicate, representing the amount of stock substituted in there, and sent a check to the McKeon Drilling Company.

The situation was this: Vincent had paid to the syndicate for more stock than the syndicate was able to deliver to him, because of its options. The auditor went beyond the stop signal and received the money from Vincent for the stock which the syndicate was unable to deliver. It was either our mistake or the mistake of the cage, that the stock Vincent paid for was in excess of the 122,000 units he was to get from the syndicate. The auditor probably had not been advised that the stock Vincent was to get in excess of the 122,000 units was to be furnished by the McKeons from their stock in accordance with the letters I read yesterday. When this mistake was discovered the overplus of sales was substituted from the McKeon stock. McKeon Drilling Company was paid the amount of the oversales, and stock of the McKeon Drilling Company was used to replace the syndicate stock. It was only our common stock that was oversold. We could have left in the syndicate the proceeds of the preferred stock sales, but we were selling that to Vincent at 57 cents and the open market was around 70 to 80 cents. Mr. McKeon was good enough to replace his stock in there, and we were very happy to do it on account of the syndicate. As a matter of fact, we sold considerable preferred stock on the market subsequent to that time at prices ranging from 60 to 80 cents a share.

With respect to the $86,310.40 which went into the syndicate account and was then taken out of the syndi-

(Testimony of Horace J. Brown)

cate account and delivered to the McKeon Drilling Company, that sum represented the amount received by the syndicate manager for the sales of stock over and above the 122,000 units that Frederic Vincent was entitled to receive, so that when the matter was discovered the McKeon stock was placed in the syndicate and the $86,-310.40 was taken out and delivered to the McKeons for their stock which had been placed in the syndicate.

When I came to Los Angeles in December, 1928, the syndicate had completely fulfilled its obligation to the Italo Company and furnished the amount of money it was obligated to furnish, and the matter was in shape to be entirely settled up.

I have seen Exhibit 104. That is the authorization to deliver 46,819 units of stock and 20,000 shares of preferred stock at 50 cents per share to Frederic Vincent & Company, that being the stock which was replaced in the syndicate, concerning which I have testified. That is the stock which was to come from the McKeon Drilling Company to fill the amount which the syndicate could not furnish. At the time this letter was written, December 12, 1928, the preferred stock was selling around 75 or 80 cents a share on the market, and the common stock at $1.30 or $1.40 per share.

Exhibit 104 was received by Shingle, Brown & Company, and the check therein referred to of $86,310.40 was sent by Shingle, Brown & Company to McKeon Drilling Company in payment for that stock. Subsequent to the transmission of the check for $86,310.40 to the McKeon Drilling Company by Shingle, Brown & Company, I had a conversation with Robert McKeon relative to that check.

(Testimony of Horace J. Brown)

Robert McKeon had a check made out for some $21,000 and stated to me that that was a part of his appreciation for what we had done in handling this matter. That was the first compensation that Shingle, Brown & Company had received for the work they had done in the matter. The check is dated December 14, 1928, and is part of Exhibit 104.

I know nothing at all about the disbursement or distribution of any of the remaining part of that $86,000. That check was delivered to us just about the same time that the syndicate fulfilled its obligation to the company and made the final adjustment. We also received instructions from the McKeon Drilling Company to deliver stock to Frederic Vincent & Company and that is the stock that was placed in escrow at the Bank of America. The purpose of the escrow in the bank was this: We had them put their partially paid accounts in there for subscriptions, written subscriptions, with instructions to the bank to deliver only to the subscribers thereto upon completion of the partial payment. The reason for it was the great lack of faith in Vincent by their particular associate brokers. The purpose of the creation of the escrow was to see that the people who were paying for their stock actually received it, and the stock was furnished by the McKeon Drilling Company from the stock in escrow with Shingle, Brown & Company.

After the termination of the escrow in the Bank of Italy, Shingle, Brown & Company on February 1, 1929, received Exhibit 55, a check dated February 4, 1929, payable to the order of Shingle, Brown & Company for $100,489.00.

(Testimony of Horace J. Brown)

With reference to the $21,000 check which Robert McKeon delivered to me in appreciation for what we had done, I had had no prior understanding with Robert McKeon of any nature whatsoever that I was to receive that money. At about the time of the general distribution of the stock I received a letter of instruction authorizing us to distribute the $100,489.00, said instructions being part of Exhibit 112. About December 19, 1928, I had a conversation with Mr. Vincent, in which Vincent said, "I think you fellows have got me all wrong, and I think you ought to give me an option on some stock or arrange an option on some of this stock for me. I have not been compensated for market losses." Apparently he did not consider this 125,000 units as compensation for market losses. He said, "I had some market losses and I carried along in this thing a long time; I have been the fiscal agent for the company a long time, and I don't want to do the situation any harm at all and I think I can be helpful. If you will give me an option on some stock I think I can buy it and retain it for my own uses." There was no syndicate stock available for option at that time. The McKeons had agreed to furnish up to 300,000 units for the Vincent Account, and had actually furnished something like two hundred and forty or forty-five thousand units for that purpose. We figured on that stock and had some roundtable sessions with our fellow pool members and they agreed if necessary they would make up the balance if the option was ever exercised. It was a friendly gesture to keep everybody happy as far as possible.

With reference to Exhibit 110, directing the distribution of 961,510 shares of common stock to Fred Shingle,

(Testimony of Horace J. Brown)

Bob and Jack McKeon told me that that stock was to be placed at the direction of Mr. Wilkes, to be used by him in compensating us and also to be used by him in working out the McKeon Oil Company picture. A few days later Wilkes stated that out of that stock that he might want to use some stock to retain Mr. Gordon in the bigger company, that he might want to give a small portion of the stock to Mr. Shores, which he never did, and of the remainder, after taking out some 112,000 shares, that 50 per cent of the remainder would belong to Fred Shingle and Shingle, Brown & Company and 50 per cent he would use himself for the promotion of the bigger company. He told us at the time that that stock was in compensation for the services we had performed in getting this deal through when it looked very bad, and also for standing in line for the larger picture.

I had had no prior definite arrangement with any one of the McKeons or Mr. Wilkes that we were to receive any definite amount of compensation for the services Shingle, Brown & Company rendered in connection with straightening out the financial matters of the Italo Petroleum Corporation of America. At the time of this conversation with Mr. Wilkes, we had already agreed with Mr. DeShadney, Mr. Pass and given Mr. Wilkes our assurance that we would stand by on the bond financing of the eastern picture, which they had told us might run as high as ten million dollars, and we would be expected to handle about half of it on the coast. I considered that the stock which we received from the McKeons was compensation for what we had done in the past and what we were to do in the future. I considered the compensa-

tion very substantial, but it represented about ten per cent of the McKeon Drilling Company's stock, which I did not consider an excessive cut in consideration of what we had done and were prepared to do.

In December, 1928, and January, 1929, I had a discussion with Mr. Trumble and asked him to write a letter to the company stating what he thought he was able to do with his patent. The first picture that I saw about the big deal was contained in a copy of what they said was a telegram they were sending to Palmer & Company in New York in early January. My best recollection is that Jack McKeon handed it to me; it had been prepared by Mr. McKeon and Mr. Wilkes.

This letter dated December 18, 1928, is the letter that Mr. Trumble wrote relative to his patent.

The letter was received in evidence and marked Exhibit QQ, and is in substance as follows:

Dated December 18, 1928, to Italo Petroleum Corporation of America from Milton J. Trumble referring to, his patents and states that the cracking plant which he is building for the Italo Company at Hynes is based on his latest patent.

This telegram addressed to Palmer & Company, 62 Broadway, New York, is a copy of the telegram that was handed to me by Mr. John McKeon in the early part of 1929, relating to the proposed new company.

(Testimony of Horace J. Brown)

The telegram was received in evidence and marked Exhibit RR, and is in substance as follows:

"Palmer Company,
62 Broadway,
New York.

Proposed McKeon Oil Company will include following properties, Italo Petroleum Company with present production of thirteen thousand barrels per day. Net earnings of company for last quarter 1928 was $1,043,000. There are eleven wells drilling on this property which will be completed during next ninety days. Cost $17,500,000 stock, $2,500,000 cash.

Dabney Johnson properties present production 12,000 barrels. Earnings last quarter $1,015,000. Fourteen wells now drilling which will be completed during next ninety days to be paid for on basis of production after completion. Past present production $6,000,000 cash.

Delaney - Edwards - Campbell - O'Donnell properties present production 4,500 per day. Past earning statement not available as to wells recently completed. Estimate earnings $125,000 per month. Cost $2,500,000 Cash, $500,000 Stock. Two wells drilling.

McKeon Brothers properties. Present production 5,000 barrels per day. Production too recent for earnings statement. Three wells drilling. Estimate earnings $100,000 per month. Cost $1,000,000 cash, $750,000 stock.

Arroyo Grande property comprises 2,000 acres proven oil land, with one well producing 350 barrels per day.

(Testimony of Horace J. Brown)

One well now drilling. This includes also 600 acres lease at Rindge Ranch considered very valuable prospective field.

These properites not considered in earning class but necessary as future reserve, cost $1,000,000 cash, $1,000,000 stock. Engineers reports as yet not all completed but am assured will show between fifty and sixty million valuation of all properties. Total present production in excess of 34,000 barrels per day and present earnings at rate of over $10,000,000 per year. Total cash required $13,000,000 to which should be added $2,500,000 working capital. Total stock required $19,750,000. In order to handle proposition $400,000 must be paid down this week to hold certain properties. McKeon and associates are willing to furnish this cash but must know that bankers are ready to go ahead with proposition."

Jack McKeon put in his resignation with the Richfield Oil Company but couldn't get away because he was in charge of important development work, but he retired as production manager of the Richfield about February 1, 1929, which was about the time that I met Mr. Lyons of Palmer & Company respecting the proposed eastern deal. I had two talks with Mr. Lyons of Palmer & Company. In January, 1929, I came to Los Angeles and spent two or three days around the company's offices in getting general information. I had in mind at that time two things. I wanted to give the brokers who were interested what I found was a fair picture of the actual condition of the company, and also had in mind the financing of the company itself for two to two and a half million

(Testimony of Horace J. Brown)

dollars bond issue. Mr. M. H. Lewis of M. H. Lewis & Company went over to the office with me. I spent a couple of days talking with the production department, and on the financial end, getting figures and facts together. I saw Mr. Lacy over there a number of times, and talked with him about the condition of the company. He was very enthusiastic at the time. The company had production then of thirteen to fourteen thousand barrels, had about 12 sets of tools working drilling, only one of which was what is known as wildcat, and were expecting larger production. Mr. Lacy said he didn't think any more syndicate stock should be placed on the market at the time. He thought the stock would be worth $3.00 to $4.00 a share. He had just exercised his option at that time to buy 100,000 shares for $100,000. I also talked to Mr. Fred Gordon and he was equally enthusiastic, and was also enthusiastic over the eastern deal if it could be made on a proper basis.

As a result of these conversations with Lacy and Gordon I made some pencil memorandums and went back and dictated this general memorandum and took it back to the office and had Mr. Gordon go over it as vice-president of the company and put his name on the top as his approval. This is a copy of the statement that Mr. Gordon wrote his O. K. on.

The document was received in evidence and marked Exhibit SS, and is identical with Exhibit No. 300.

After John McKeon resigned from the Richfield Oil Company he went east with Mr. Lyons of Palmer &

Company. Mr. Lyons had told me in the presence of Jack McKeon and A. G. Wilkes in Los Angeles that there was no question at all about the deal going through, and Jack McKeon was going east with him and it would be closed up very quickly. He indicated the amount of the bond issue would be determined, that they would handle $10,000,000 in bonds, and I told him we could handle about half of them on the coast.

With respect to Shingle, Brown & Company receiving any portion of the stock bonus that was to be issued to the eastern bankers for the financing of the bond issue, I told him I presumed the eastern bankers would want the stock bonus. I asked him if we would have any interest in that and he said no, that the eastern bankers would handle that entirely back there, that we could handle some of the bonds. We had already been compensated and I said we would do so to the limit of our ability.

In order to get in a financial position to handle these bonds we sold stock over a period of three months ourselves, a few thousand shares at a time so as not to disturb the market, and placed ourselves in a financial position to handle the bonds. I imagine Shingle, Brown & Company received around $450,000 to $500,000 from the sales of that stock. After the money was received from those stock sales, it was put into the general assets of the firm and carried there until the end of 1929, before it was taken into the profit and loss account. I went east around the middle of April, 1929, on some business, and then went on to New York and saw John McKeon there. Jack was still somewhat hopeful but he had been back there two or three months. The deal was supposed to be

closed every other week and he still had one matter to thresh out but he was considerably disappointed. The deal was almost closed two or three times with other large houses, but whether it was due to market conditions or otherwise I don't know. The deal wasn't quite closed. He told me that the deal at that time was coming down to be largely a stock matter, and I told him that I didn't think it could be successfully handled as such. The market was very heavy on new issues of stock, what is known as undigested securities. The dealers' shelves were pretty full and they weren't interested in new securities. We were coming very definitely to the big break in the latter part of the year. I told Mr. McKeon in the language of the street that I thought he had been getting the runaround back there. I also talked to Mr. Lyons of Palmer & Company, in the presence of Mr. McKeon. I asked him what was doing and he said he thought the deal was still all right and going through all right. He asked me if we wanted to handle half of it and I said, "What is the deal about? I want all the details." He said, "Well, we are changing these things so that I am not prepared to give them to you." I said, "Well, I am leaving for the coast; send me the details and I will give you my answer." Subsequent to that I came back to the coast.

In March, 1929, I believed that the McKeon Oil Company which was under discussion at that time was a certainty to go through. In March, 1929, I had a conversation with Frederic Vincent relative to an extension of his option on the stock, and he said thought this deal was going through, and if it did go through the informa-

(Testimony of Horace J. Brown)

tion that he had indicated the stock would be worth $16 to $18 a share.

I never saw Exhibit 116 until it appeared in the courtroom. I did not have any knowledge or information in March, 1929, that the McKeon Drilling Company stock, amounting to 2.500,000 shares, had been distributed to other persons. On the contrary, it was around 2,000,000 shares or less, as far as our escrow instructions went. During all of this period of time concerning which I have testified, I never acted as an agent, employee, director or officer of the McKeon Drilling Company or any of these other corporations that have been here referred to. I was an independent broker dealing for myself.

CROSS EXAMINATION

(Mr. Wharton) By being an independent broker I mean working for Shingle, Brown & Company with my partners.

With reference to Exhibit 299, line 4, stating that 1250 units of the 40,000 units of stock went to me, that stock was issued in my name and I endorsed the certificate to O. B. Wilkes, the wife of A. G. Wilkes. Whether she paid the $2500 on that subscription or whether Mr. Wilkes paid it, I do not know. I do not know where that stock went after I endorsed it, but I know it did not go to me.

The Mikel and Jones certificates were endorsed and turned back. The Mikel and Jones subscription was paid by Mr. Perata. The other names appearing on Exhibit 299 as subscribers to the syndicate were subscribers and

apparently received their stock. I know that Perata and Mrs. Wilkes were subscribers to the syndicate.

I heard the testimony of George Stratton relative to the 230,000 units of stock and the three checks for $83,000, $24,750 and $44,092.90, and that the first two of those checks were delivered to the Mongomery Investment Company for the purchase of the 195,000-odd units of stock standing in the name of Fred Shingle. The endorsement on the back of those first two checks is in the handwriting of Fred Shingle. The Montgomery Investment Company had no bank account, but was a trading account handled through Shingle, Brown & Company entirely. The funds that came into the *the* Montgomery Investment Company account went into Shingle, Brown & Company's bank account. These checks went into the bank account of Shingle, Brown & Company with the American Trust Company to the credit of Mongomery Investment Company. Those funds would be checked out by Shingle, Brown & Company. The endorsement on the check for $44,092.90 is in Fred Shingle's handwriting and was handled in the same manner as the other checks. I assume that that money went into the general cash account of Shingle, Brown & Company, the way any customer's account went in. The Montgomery Investment Company was a customer of Shingle, Brown & Company, owned by four men. Shingle, Brown & Company received $25,122.25 as a result of the Bank of Italy or Bank of America escrow of the Vincent & Company stock. Shingle, Brown & Company also received $21,577.60, which is one-fourth of the $86,310.40 from the McKeon Drilling Company, and also received $17,969.18 from

(Testimony of Horace J. Brown)

the Mikel No. 2 account. I assume that those three amounts went into the ordinary and usual banking account of Shingle, Brown & Company and was used by that company in the ordinary course of its business. Shingle, Brown & Company derived its name from Fred Shingle and myself. I think when it was first formed that Bob Shingle, Mr. Shingle's brother, and his partner, Mr. Campbell, put a small amount of money in with us, and I think that Herbert Fleischacker put in $5000 when we started, which we later repurchased. Mr. Fred Shingle and I were the first beneficiaries of the profits of the concern, and later Jones and Mikel came in. After the four of us were in the corporation we shared in the profits of the corporation on an equal basis.

The $5000 which Fred Shingle personally subscribed went into the corporation or the partnership; we shared in whatever profits inured to it. Jack McKeon told us to put up two to three hundred thousand shares in the Vincent account, and any stock that was not put up remained in the possession of the escrow. We did have 122,000 shares of stock at the time the Vincent matter came up, and we thought we needed about 300,000 more shares, which we did not have in the syndicate and the McKeons put up that stock. McKeon put up about 245,000 units.

With reference to the various pools, Mr. Shingle received and distributed the money of the pool. I think the actual management devolved upon Plunkett and Lilienthal and Geary Meigs, who were active members of the Exchange. The income from the pools came to Shingle, Brown & Company, and Shingle, Brown & Company

turned the profits over to the pool members who were entitled to receive them, and the checks in evidence show the amounts that were turned over to the various members of the pool. The 961,500 shares of common stock shown by the exhibit was ordered to be delivered to Fred Shingle at the expiration of the escrow, with the understanding it was placed at the order of Mr. Wilkes. Mr. Wilkes directed that when he had taken out all the stock he desired to use for certain purposes, that the remainder of it was fifty per cent his and fifty per cent Mr. Shingle's, which meant, ourselves, Shingle, Brown & Company, and Shingle, Brown & Company received around 425,000 or 450,000 shares of that stock. It is my recollection that he took some of the stock from Mr. Gordon, but I don't think any of it went to Mr. Shores, at least that is what Wilkes told me. I had nothing to do with it.

The stock that went to us went to us for compensation for our services performed and to be performed. The big deal did not materialize and fell through, and we did not turn that stock back after the deal had failed, but kept it as our compensation. I do not know whether Fred Gordon retained his stock or not. Out of this chaotic condition, Shingle, Brown & Company received the sums of money mentioned by you, of $25,122.25, $21,577.60, $17,969.18, and about 450,000 shares of common stock.

Exhibit 311 for identification is a telegram to A. G. Wilkes at the Biltmore Hotel, dated August 6, 1928, stating, "Pursuant to your request have wired 30,000 syndicate funds to Myers as further advance Italo to apply on property purchase account," signed Horace

(Testimony of Horace J. Brown)

J. Brown. The $30,000 referred to in that wire was for property purchase account. I cannot tell you anything further about the $30,000 excepting that it was accounted for later by Myers in his account to the syndicate. The syndicate under its terms was privileged to advance up to $500,000 prior to the deal going through, and if the deal had not gone through the company owed the syndicate $500,000. By that I mean the Italo Company. I do not know what became of that $30,000 except that it was accounted for in the later proceedings from Myers as trustee of the company.

This is my signature on this letter. The $30,000 mentioned therein probably refers to the $30,000 that we are talking about.

The letter was received in evidence and marked Exhibit 327, is in substance as follows:

August 6, 1928,

Bank of Italy,
Powell & Eddy Streets,
San Francisco, California.

Attention: Mr. Skinner.

Gentlemen:

We hand you herewith our check for $30,000 and request that you wire your Los Angeles bank to immediately make this amount payable to Maurice Myers, care of Spalding & Myers, attorneys, Quinby Building, Los Angeles, California.

Very truly yours,

Shingle, Brown & Co.,
By Horace J. Brown."

(Testimony of Horace J. Brown)

A great many of our funds were wired down here. I cannot tell you the necessity for any haste at that particular time. I haven't the slightest idea. We handled four and a half million dollars, much of it by wire.

This is a check issued by Shingle, Brown & Company on the Wells Fargo Bank & Trust Company for $30,000.

The check was received in evidence and marked Exhibit 328, and is dated August 6, 1928, for $30,000, payable to the Bank of Italy, and drawn by Shingle, Brown & Company, by L. J. Byers and Rossiter Mikel.

It was thereupon stipulated by counsel for the defendant Myers that the endorsement on a certain check was the endorsement of the defendant Myers and of W. D. Spalding, a partner in the firm of Spalding & Myers.

The check was received in evidence and marked Exhibit 329, and is a cashier's check for $30,000, payable to Maurice C. Myers, endorsed Maurice C. Myers, Spalding & Myers, and W. D. Spalding.

It was thereupon stipulated by counsel for the defendant Myers that a receipt dated August 6, 1928, was for $30,000, showing that amount paid to Maurice C. Myers, and bore the signature of the defendant Maurice C. Myers.

The receipt was received in evidence and marked Exhibit 330.

(Testimony of Horace J. Brown)

I have seen this document entitled "Properties under consideration;" I probably saw it sometime around the 1st of June, 1928, when they were first bringing in a possible resumé of the possible properties to be purchased, showing the extent that the syndicate would have to provide funds. The portion in handwriting on the last page is my handwriting.

The document was received in evidence and marked Exhibit 331.

It is my recollection that I saw that document at the time Mr. Wilkes brought it to our attention with various memoranda in connection with the proposed purchase of properties for which he was negotiating. I do not have any knowledge as to who prepared this particular document. I know we did not. I presume that the matters appearing on the last sheet of the document, where it says "Cost" and "Cash" and "Stock" refer to the proposed price to be paid for the properties, the production means probably the production in barrels per month, and the "Earnings" refers to the monthly earnings, showing the monthly production then of the McKeon properties to be 100,000 barrels per month and the net earnings $130,000.

I do not know where the document came from originally, but the Government probably obtained it from our records given to the postal inspectors. I was furnished various statements as to the properties and how much money had to be provided and how much stock had to be provided for the various deals if they were completed,

(Testimony of Horace J. Brown)

and I do not know from whom it was received. This was a memorandum left which was given to me upon which I made some notes or comments and it was left in our files.

Exhibit 331 was objected to by defendants on the ground that no proper foundation had been laid because the source of the exhibit had not been shown, and it was hearsay; the objection was overruled and an exception noted, and thereupon defense counsel moved to strike the said Exhibit 331 from evidence on the ground that a sufficient foundation had not been laid to make it in anywise probative of any facts recited, especially as to value, but on the contrary the evidence affirmatively showed it had not been made, produced or dealt with in such a way as to give it any probative value of the facts recited, and upon the further ground that it was hearsay as to all defendants until the authorship of the said exhibit had been established. Motion denied. Exception. Exhibit 331 is entitled "Properties under Consideration," the last sheet of which contains the item: "McKeon—Cost Cash $1,000,000.00, Stock $3,000,000; Production, $100,000; Earning $130,000."

Cross Examination

BY MR. WEST: A With reference to my testimony as to numerous conversations had with Frederic Vince and Mr. Wilkes relative to the acquisition by the Italo Petroleum Corporation of various properties, I do not think that Perata or Masoni were present at any of those conversations. I *know* them very slightly at the time. I do not know who negotiated for the purchase of any of

the properties. I assumed Mr. Wilkes was doing that. For Mr. Perata's subscription of $125,000 to the big syndicate, he received back 52 per cent in cash, a ratable interest in some $45,000 worth of notes, and ratable to the amount of money they put in the syndicate, which was $1,911,000, and then a considerable block of perferred and common stock of Italo Company. The syndicate members did not lose 49 per cent. At the time they got their stock it probably represented another 25 per cent in dividends and value on the market at that time. Whether it could have been sold at that time I don't know, but there was probably a loss of 25 per cent as it eventuated. Mr. Masoni's loss in the syndicate would be upon the same ratio.

I do not think it was an unusual thing for those persons who were heavily interested in the corporation to go into the syndicate. I have seen similar matters; it depends upon the purpose of the syndicate, of course, very largely. In the case of the big syndicate here, it was formed for the purpose of assisting the company in acquiring these properties, and it is perfectly true that if the officers and directors and those close to the company would not come into the syndicate I don't know of any special reason why any outside people would do so. It would be regarded as unusual. We did not endeavor to put our money into the syndicate ourselves because it was the clear understanding that we would not do so. As a rule, outsiders would naturally not go in to a syndicate unless those who were heavily interested in the corporation themselves would show their good faith by coming into the syndicate and putting up some money.

(Testimony of Horace J. Brown)

I think that a very large part of the money represented by the syndicate was put in for two reasons: naturally, they hoped to make a profit, and another reason was they sincerely desired to see this company go forward. It would not be unusual for a person having an interest in the company as a director to be in a syndicate of this kind. In a syndicate of this kind it was usual for those who were heavily interested in the corporation to go in and put up some money and ask outsiders to join them.

Thereupon defense counsel called the attention of the Court and jury to the fact that Exhibit 331 was similar to the report of A. G. Wilkes to the board of directors of the Italo Petroleum Corporation of America contained in Exhibit 16-A, beginning at page 134.

REDIRECT EXAMINATION

With respect to the testimony of Mr. Stratton, referred to by Mr. Wharton on cross-examination, to the effect that Frederic Vincent & Company purchased 195,000 units of Italo Petroleum Corporation of America stock on June 11, 1928, and paid Shingle, Brown & Company the sum of $107,750.00 therefor, and two days later bought an additional 34,000 units of the same stock and paid therefor $44,000, it is not a fact that we sold Frederic Vincent & Company 195,000 units of said stock on June 11, 1928, and received therefor the sum of $107,750.00. It is not true that two days later we received $44,000-odd for 34,000 units of said stock. A little simple arithmetic would show that the first transaction represented by those checks the price would be 55 cents per unit, and the next block the next day represented

$1.27½ per unit. It does not make any sense. We did not sell any stock; we never owned it.

With reference to Exhibit 311, as I recall it, I had received a request to wire $30,000 syndicate funds to Myers as a further advance to Italo to apply on certain property purchase accounts. There was nothing unusual in the syndicate wiring funds to the trustee in Los Angeles for the purpose of being applied on the purchase of properties. There were numerous instances of that. For instance, on June 19, 1928, we wired $225,675.00 to the trustee. We also wired funds on August 16, 1928, as evidenced by this communication, part of Exhibit TT, and also by this receipt which is dated August 13, 1928, part of Exhibit TT.

(Examination by Mr. Wood:) Prior to the granting of the permit on August 9, 1928, the syndicate had advanced about $350,000 for the use and purposes of the Italo Petroleum Corporation of America for payment on the properties. If the permit had not been granted, or if for any reason the entire situation failed, the money advanced would have been credited the Italo upon an open note of the Italo Petroleum Corporation of America, but without any security.

RECROSS EXAMINATION

I heard the testimony of George Stratton relative to the price paid for the 230,000 units; he testified he bought all the stock and then he said he bought it again. I don't know what he meant by equalization.

(Testimony of E. M. Brown)

E. M. BROWN,

recalled as a witness on behalf of the defendants, testified under oath as follows:

I heretofore testified as a witness for the Government. I testified that the signature appearing on Exhibit 157 was not my signature. Defendant's Exhibit H for identification is signed by me and is a duplication of Government's Exhibit 157.

Thereupon Defendants' Exhibit H for identification was admitted in evidence.

In 1928 I was in the office of Spalding & Myers and held a real estate broker's license, and was at that time engaged in studying law. In 1927, at the request of Mr. Spalding, or Mr. Myers, I leased some property for them, acting on behalf of Mr. Spalding. That was in connection with some properties at Huntington Beach. I acted a number of times, and also acted as a dummy in the Brownmoor transaction, which was nothing new so far as I was concerned in the office

These three documents are signed by me, and were executed in connection with the so-called Brownmoor deal in the transfer of the Brown lease in Inglewood. This letter dated August 15, 1928, is signed by Maurice C. Myers. He was trustee for the Italo Petroleum Corporation of America while I was in his office. A number of shares of stock were held in my name, and a great deal of Italo stock was placed in my name at the request of Mr. Spalding or Mr. Myers, said stock being street certificates. I never considered that I owned the stock outright and

never received any commission of any kind. In 1930 I received a notice from the revenue department of the United States relative to the matter of income tax on the Inglewood lease; that is the Brown property at Inglewood; by which a tax was proposed to be assessed against me. In that connection I made an affidavit which was forwarded to the department, with a view to relieving myself of that tax liability. This is a copy of that affidavit. This is a copy of the affidavit of E. Byron Siens.

The affidavits were received in evidence and marked Exhibit VV, and the three documents in connection with the Brownmoor deal were marked in evidence as Exhibit UU.

Exhibits UU and VV are in substance as follows:

Exhibit UU is an agreement of sale by Brownmoor Oil Company dated May 2, 1928 to E. M. Brown of certain property. Also an agreement of sale by trustees of Monrovia No. 2 Oil Co. to assign to E. M. Brown 125,000 shares of Brownmoor stock and certain notes amounting to $50,000. And a similar agreement executed by the Monrovia Oil Co.

Exhibit VV is a protest by E. M. Brown dated November 17, 1930 against the assessment of a deficiency tax of $29,491.00 outstanding against the Brownmoor Oil Company and stating that Brown acted as agent for Brownmoor Oil Company in transfer of Inglewood property to Monrovia Company in exchange for 250,000 shares of Brownmoor stock and certain promissory notes; that Brown transferred the stock to the Brownmoor Oil

(Testimony of William D. Spalding)

Company and that he had no interest in the stock or notes and was only an intermediary for the company.

Also affidavit of Byron Siens stating that he has read the protest of E. M. Brown and that it is true of his own knowledge.

CROSS EXAMINATION

Mr. Myers requested that I receive the assignment of the Monrovia 250,000 shares of stock, and also that I accept assignment of the $100,000 in notes that were made by the Brownmoor Oil Company payable to the Monrovia Oil Company. The same is true with respect to the Inglewood lease. The only two persons I talked to about these transactions were Mr. Siens and Mr. Myers. I never received any direct promises of any compensation for my services.

I received the 250,000 shares of Brownmoor stock in my name and I endorsed them in blank. I delivered the $100,000 in notes that I received from the Monrovia Oil Company and delivered them to Mr. Siens. I never received any payment on account of those notes. I do not recall whether I gave the 250,000 shares of Brownmoor stock to Mr. Siens or to Mr. Myers.

WILLIAM D. SPALDING,

a witness on behalf of the defendant Myers, testified under oath as follows:

I am and have been an attorney at law for twenty years, and have known Maurice C. Myers for eighteen years. In 1927, '28 and '29 Myers and myself were law partners, doing business under the name of Spalding &

Myers, and acted as attorneys for various oil companies, probably twenty to thirty oil companies. We were attorneys for the Italo Petroleum Corporation of America. We had two attorneys working for us. Our office help averaged from three to five stenographers, and sometimes there were more than five.

About a year after August 28, 1928, I was able to give very little attention to the office personally on account of injuries that I had sustained, and during that time Mr. Myers handled the office. During a part of the time before August, 1928, when I received this injury, Mr. Myers was trustee for about 12,000,000 shares of stock and as trustee he received certain funds, which were deposited in the California Bank and the Bank of Italy, now the Bank of America. Myers usually handled the California Bank account and I handled the Bank of Italy account.

After we became attorneys for the Italo Corporation of America about 75 per cent of our entire business was devoted to that company. There was never any agreement with that company as to fees or retainer. I do not think we rendered bills. It was difficult to place a value on the work and it was a going organization and our compensation was, it was always understood that it was to be uncertain with the success of the venture as well as with the amount of effort that we put in.

In the summer of 1928 I had a number of conversations with Myers regarding our compensation from Italo. I complained to Myers about the lack of funds coming in from Italo on several occasions. Myers as trustee had a great deal of the Italo stock, which was placed in street

(Testimony of William D. Spalding)

names, such as the name of E. M. Brown. That was done as a matter of convenience in the exchange of stock. By that I mean stockholders in various companies acquired by Italo would bring the stock in to exchange it for Italo stock. For instance, the Modoc Petroleum Company. The Italo offered to exchange stock with the stockholders of the Modoc, and did, and that was used in that manner. A number of shares were placed in the name of E. M. Brown for the purpose of making change. I received a number of communications from Mr. Wilkes, general manager of Italo, and Fred Shingle, syndicate manager, regarding the payment of moneys by the company. These requests came by telegraph and by telephone and by letter.

I have seen Exhibit 329 before. That is my handwriting on the back of that check, and also Mr. Myers' handwriting. "Spalding & Myers" and my signature below that is written by me. I first saw this check in the office of Spalding & Myers about the date of the check, that is, about the date the check was cashed. About noontime of that day I walked into Mr. Myers' room and he was standing there, or seated at his desk, and Mr. Siens had the check in his possession or in his hand, and he asked me if I could get that check cashed. I look at it and saw it was on the Bank of Italy and told him I could and I did. I got it cashed at the Bank of Italy at 7th and Olive Streets. Mr. Siens was with me. I gave the proceeds of the check to Mr. Siens. I do not know what Mr. Siens did with the money. I do not recall any particular conversation relative to the check other than I have related. After giving Mr. Siens the proceeds of the check

(Testimony of William D. Spalding)

I went to lunch. I walked with Siens as far as the Biltmore Hotel and left him at the lobby of the Biltmore Hotel. I know that Mr. Myers as trustee kept accounts, and endeavored to keep very careful accounts. He rendered reports as trustee to the syndicate in San Francisco and to the Italo Petroleum Corporation. Upon the termination of the trusteeship of Mr. Myers there was a complete accounting rendered, which was accepted as absolutely correct for everything that had been entrusted to him as trustee, in both stock and cash. I do not recall the name of the accounting firm, but think that it was Peet, Marwick, Mitchell & Company.

During the time that we represented Italo Petroleum Corporation of America as their counsel there was never anything that I know of that was irregular, improper, unethical or unlawful in the transactions of myself or Mr. Myers with regard to the Italo Petroleum Corporation. I remember when Myers received a large block of the Italo stock. I believe it was about 42,500 units. Mr. Myers divided that stock with me on an equal basis. Mr. Myers said at the time that the 42,500 units came from the office of the McKeon Drilling Company. I do not know that Myers told me why he received it, but I knew it was received as a fee for services rendered by our firm, and it was so considered by both of us. I felt that our firm had earned that money represented by that stock. On the contrary, I never felt that Italo Petroleum Corporation of America had ever overpaid us in any way for the services rendered by our firm to them.

(Testimony of William D. Spalding)

I remember the original of this letter being brought to me by Mr. Myers, and his stating that he proposed to send it to the Commissioner of Corporations, and we discussed the advisability of sending the letter, and I remember that I expressed myself that it was a little strong, couched in rather severe terms. I know that the original letter was sent on or about the date it bears. Mr. Myers signed the original letter.

The letter was received in evidence and marked Exhibit XX, and is in substance as follows:

Dated July 26, 1928, to the attention of Wolch, from Maurice C. Myers stating that the application of the Italo Petroleum Corporation was filed July 9, 1928; that conferences were held; that conferences were held and that the company complied with all requests for further data and that the Deputy Corporation Commissioners were apparently satisfied. Further stating that for the past week Myers had been repeatedly advised that nothing further was required and permit would be granted in a few hours, but it had not been granted and no explanation given as to why it had not. Further stating that by reason of the delay the applicant and its stockholders are being injured $10,000 per day and demanding an explanation immediately.

CROSS EXAMINATION

(By Mr. Wood) I believe the division of the stock by Mr. Myers was made in 1929. I do not know whether that stock came from the 12,000,000 shares of stock delivered to Myers as trustee under the permit of the Cor-

poration Commissioner, but I do know that it came from the McKeon Drilling Company; I knew that by reason of the fact that the document not only satisfied what the Italo Petroleum owed us, but also a considerable bill that we had against the McKeon Drilling Company. It was settled at one time. I knew that out of the 12,000,000 shares of stock delivered to Myers as trustee, 4,500,000 shares was placed in escrow with Shingle, Brown & Company. Myers did not make any division of the stock with me at the time the permit was granted.

CROSS EXAMINATION

(By Mr. Redwine) I knew that Mr. Myers was acting as trustee for the Italo Petroleum Corporation of America in disbursing moneys and stocks for the benefit of the company. I did not know that the $30,000 check, Exhibit 329, represented funds that Myers was holding in trust for the benefit of the Italo Petroleum Corporation of America. I do not know that now. I would say that Wilkes was not present at the time that I endorsed the $30,000 check and gave the cash to Siens. I paid the money to Siens at the bank. I believe there were some thousand dollar bills in the money. I did not ask Siens for a receipt for the money. I knew that Mr. Myers was satisfied as to the propriety of sending the check to Mr. Siens or he would not have asked me to have it cashed. All I know about the check is that it was endorsed by Myers in the office, and I went to the bank with Siens, and endorsed the check at the bank, got $30,000 and gave it to Siens, and where he went with it or what he did with it, I do not know. I do not know

(Testimony of William D. Spalding)

whether the $30,000 or any portion of it was used for the purpose of obtaining a permit for the Italo Petroleum Corporation of America.

MR. WOOD: I object to that question, your Honor, and ask it be stricken out, and cite the statement of the District Attorney as misconduct. This witness has stated he didn't know, and Mr. Redwine has suggested, in the face of the evidence showing a lack of knowledge of what it was used for, an insinuation that it was used for an unlawful purpose, and I cite the remark at this time as misconduct on the part of the District Attorney.,

THE COURT: No, I do not think that is misconduct. I do not think that is any kind of misconduct. It is the business of this court and this jury to trace that $30,000 to the nethermost limit. The truth will show. That is our business here. The objection is overruled.

MR. WOOD: Exception.

A From time to time we received cash from Italo Petroleum Corporation of America for services we performed for them. I believe we submitted bills to them at irregular intervals. We had done some work for the McKeon Drilling Company, and had submitted bills to them. At the time I refer to in my testimony, Myers received 42,500 units. I never received any other stock than that at that particular time. Myers got half of that. Mr. Myers received some other stock from this same source, but did not divide it with me. The services that we had performed for the McKeon Drilling Company and the Italo Petroleum Corporation of America were partnership services, if I had not been incapacitated for a

year, which would render a little different distribution. When I came back to work, Mr. Myers and I made what we deemed an equitable division under the conditions that then existed, satisfactory to both of us of the profits or assets of the partnership. Myers told me of the additional stock that went to make up the 62,500 units. He notified me of the receipt of any other money or stock from the McKeon Drilling Company, but I do not recall what it was without the books. He did not notify me that there was a partnership account of Wilkes, Cavanaugh and John McKeon which was selling stock through the market in the name of M. Taber and E. Tropp, and that he had received $6000 from that partnership. I do not know of any $6000 that I could testify about. Our firm represented Fred Shingle as syndicate manager, and received $12,500 because of that representation. I do not know, but I presume we received a dividend of $1,093.75 on account of the 62,500 shares of stock. I believe that between March 1, 1928, and November 1, 1929, our firm received about $19,000 from Italo Petroleum Corporation of America for services rendered to it. I do not know how much was paid by Italo Company between December 26, 1929, and October 3, 1930; I do not know whether it was the sum of $16,150.00 or not.

REDIRECT EXAMINATION

(By Mr. Abrahams) I have frequently had occasion in fixing fees to fix them where they were payable in oil stock and also fees that were payable in cash. With reference to whether or not fees that are payable in oil stock it is the practice of lawyers to charge anywhere

(Testimony of William D. Spalding)

from twenty to fifty times as much as they would if payable in cash, that depends on the prospects and the contingency; this was contingent when we took this work, on any development of the Italo. Oil stock is not considered by lawyers in fixing fees as the equivalent of cash. All members of the bar fix a very much larger fee where we are going to take stock in some company rather than taking money where we can put it through the teller's window, particularly where the matter is dependent upon the development of the venture.

(By Mr. Meader) The $12,500 fee received from Fred Shingle as syndicate manager went into the firm account to be divided between Mr. Myers and myself, at least it went into the firm account to meet the obligations of Spalding & Myers, and so far as any benefits therefrom were concerned, Myers and I shared in them equally.

The $19,000 that I testified we received between March 1, 1928, and November 1, 1929, I considered as being nowhere near adequate for the work and expenses to which we were put. I used to figure our overhead ran about $50.00 a day for every working day. The officers or directors of Italo Petroleum Corporation of America when in Los Angeles would make our offices their headquarters and use our facilities, and we maintained rooms there for their convenience, and allowed them to use our telephone and stenographers. The telephone and stenographic services were never itemized, but were charged as part of the expenses of Spalding & Myers.

(Testimony of William D. Spalding)

RECROSS EXAMINATION

We probably entered some charges for telegrams or telephone calls to Italo Petroleum Corporation of America, when we could keep track of them. I used Clay McCarty in connection with the leasing and oil ventures that were not connected with Italo. I used him as a bird dog to find leases and negotiate leases.

When Myers took delivery of the 62,500 units of stock from the McKeon Drilling Company, I was not present; however, when he came back to the office he told me that he had signed a receipt that he didn't particularly like, that waived any claims from the beginning of the world for any services that had been rendered in the past.

(By the Court:) I did not make any particular inquiry of anybody as to the purpose of the $30,000 check. I handled a great deal of money and made payments involving several hundred thousands of dollars at the time and it wasn't of particular significance. I know from the general conversations what I understood was the purpose of it, and that was a commission on the Graham-Loftus transaction. I do not recall making inquiry of Mr. Siens as to the purpose of the money. I assume I knew why. I believe that my experience with oil brokers would tell me why. I have done it before. In all of these transactions there are usually two or three brokers that get together and one will feel that the commission is his and another will feel that he is entitled to a part of it, and frequently they don't like to leave any opening for an attachment of the money. Among these oil brokers that is the custom.

(Testimony of Maurice M. Myers)

(By Mr. Redwine) I do not believe that the purchase of the Graham-Loftus properties had been completed at that time. I think there had been a payment made on it. I think prior to that date I made a payment to the Farmers & Merchants Bank of some $381,000, if I remember correctly. I did not discuss to whom the commission was to go on the Graham-Loftus deal. I wasn't concerned with that particular deal. My activities in this were that I happened to be in the office, and happened to have a relationship with the Bank of Italo so they would take the check and give me the money. That was my function there entirely.

MAURICE C. MYERS,

a witness in his own behalf, testified under oath as follows:

I am and have been an attorney at law since 1914, having graduated from the University of Michigan, and have practiced in Los Angeles since 1914, except during the duration of the war when I was a Major in the air service. Since the war I have been a partner of William Spalding. Since the war I have specialized in oil matters and in corporation work, drawing leases, agreements, drilling contracts, various matters with reference to drilling, producing and marketing of oil, and applications before the Corporation Department for permits. I represent now about 20 oil companies, and at different times we have represented as many as thirty or more, I presume a hundred all together. I first heard of Italo Petroleum Corporation of America in April or May of 1928. Our firm

were never attorneys for Italo-American Petroleum Corporation.

Beginning in April or May, 1928, we handled legal work for Italo Petroleum Corporation of America in the southern part of the State. The company had other attorneys in the northern part of the State. Prior to becoming attorneys for Italo Petroleum Corporation of America we performed legal services for the McKeon Drilling Company. Prior to becoming counsel for Italo Petroleum Corporation I never heard of the Brownmoor Oil Company. My partner was a director of the Modoc Petroleum Corporation. Neither Mr. Spalding nor myself was ever an officer or director of the Brownmoor Oil Company or the Italo-American Petroleum Corporation.

In the latter part of April or the early part of May, 1928, we performed our first services for Italo Petroleum Corporation in connection with the Brownmoor transaction. Mr. Siens, and I believe Mr. Wilkes, told me that the Brownmoor Company owned a property at Inglewood, a refinery, and the Cauley lease up near Bakersfield. The Inglewood property had a $100,000 mortgage or trust deed against it that the Italo Company did not want to assume, nor did it want the Inglewood property. Mr. Siens had arranged with Mr. Lawler to turn back the Inglewood property and receive back the trust deed for $100,000. There was a question raised by the Brownmoor attorney as to whether their charter powers permitted them to make a direct exchange of property for stock, and it seems that the Monrovia had two certificates for 125,000 shares each of Brownmoor stock. It was

necessary to have a third party, so we asked Mr. Brown in our office to serve in the capacity of a medium through which this exchange would be made by Mr. Siens. I proceeded to draw up papers which in effect accomplished this: the Inglewood property was conveyed to Brown and I drew up the papers for the Monrovia trust for the delivery to Brown by assignment of the trust deed, notes and stock. The deal was consummated within a few days.

The next matter was the Modoc deal. The Modoc was a little company in Long Beach with two producing properties, about three or four wells. Before that we had been attorneys for the Modoc Company and had been asked by various operators to try to make a deal to buy the Modoc Company or the controlling interest. They would never entertain any deal at all. My partner and I met with them several times, and finally the directors, Gillespie, Brittain, Rimmer, Hoisington and Walsh, said that they would sell a controlling interest, which amounted to one hundred and eighty some-odd thousand shares out of 285,000, being approximately two-thirds, for $1.50 a share. We negotiated with the Modoc Company at the request of Mr. Wilkes. He thought it was a good deal and a good proposition, and I drew up the contract and opened the escrow. At the time of the signing of the contract we anticipated acquiring as much more of the stock as could be gotten at approximately that figure. I asked and secured from the five men who signed this contract, the directors, that they purchase no more of the outstanding stock and let us have the opportunity to buy that as cheap as possible. These five directors agreed to that.

(Testimony of Maurice M. Myers)

The result was a down payment of $10,000, and a contract giving perhaps 60 days to complete the purchase. The contract was carried out in my name, as were a number of other contracts.

The contracts were taken in my name for several reasons; one reason was it was throught advisable not to disclose the principal, especially after it became known that the Italo was in the market to buy properties. Another one was it was much speedier, it did not require meetings of the Board of Directors in San Francisco to confirm the deal. Another reason was that some of the deals required payment of stock which could not be definitely accomplished without permit from the Corporation Department. It was not desirable to disclose the principal because we presumed and knew from experience that the price would be higher if it were known that the Standard Oil Company, for instance, was bidding for the properties. We have acted for some rather large companies in similar matters and at this time the Italo was known to be looking for properties.

This agreement was made by the directors of the Modoc, that they would not purchase any additional stock from other Modoc stockholders. We proceeded with the escrow. The Company sent down the first ten thousand payment, and I believe either $70,000 or $90,000 later. The directors of the Modoc lived up to the terms of the agreement that they would not purchase any additional stock from other stockholders of the Modoc, except L. J. Gillespie. It developed later that he bought almost 10,000 shares from a woman living in Long Beach. Several

(Testimony of Maurice M. Myers)

months later I got word from San Francisco that Mr. Gillespie had come into the Italo office and wanted $1.50 a share for the Modoc stock, and indicated that he would accept $1.00 a share for it, and they referred it to me for answer.

Previous to that time arrangements had been made to exchange Modoc stock for Italo stock. In June negotiations were in progress with various other companies. The Gilmore properties were being considered, the L. T. Edwards property was being considered, and negotiations were on with the McKeons for weeks. I would say in four or five weeks the Edwards deal was abandoned because of defects in the title and also because it proved to be a questionable deal as to value, but by July properties were lined up sufficiently to make application to the Corporation Department for a permit.

Almost every different contract had a different situation. One property, the big Graham-Loftus property, was an outright cash deal for $3,000,000 in installments, the first installment to be three hundred and some-odd thousand dollars, the next six hundred and some-odd thousand dollars, and then $166,666 each per month. The McKeon property deal was different; it was $500,000 cash, $500,000 assumed debts, $500,000 in notes, 4,500,000 shares of stock. There was no deal on the Modoc except for the purchase of this big block, but the company desired to acquire as much more as possible, so the application included a provision to exchange one share of Italo common and one share of Italo preferred for two shares of Modoc. The Producers contract was entered into with the McQuigg In-

vestment Company, which held the controlling interest, and was an outright purchase of a big block of stock. The Producers Company owned 99 per cent of the Traders Oil Company and an interest in the E. & M. Oil Company, and some other company.

In October, 1928, I wrote back to the company and told them of the breach of the agreement by Gillespie, and told them that I believed that he should be told that his stock was not essential, that he had violated his agreement, and that it should be bought cheaper. I next heard from Jack Chambliss, a broker in Long Beach, in December; he came into the office and said, "I believe that I can get that block of Gillespie stock but Lou will not pay and he wants the cash; he will not take any sort of trade." I said, "Find out what you can get it for." He came back later and said, "I can get it for around $5915.00," which was about 60 cents a share. He wanted $450.00, some odd amount, as commission. The total amount was $6400. In the meantime I went ahead buying the Modoc stock for whatever it could be bought for and bought for the company, I think, 22,000 additional shares at an average price of eighty some cents a share. The original contract price was $1.50. Some of it was bought for as high as $1.00, and some as low as 65 cents a share. When the permit was issued the money was all forthcoming from the syndicate. The company said, "We have no more funds to acquire these properties for cash, we look to the syndicate." The syndicate manager, Mr. Shingle, told me there was no use of me paying the cash for that when I have a provision in my permit for an exchange. Cash should be used for the obligations and requirements,

(Testimony of Maurice M. Myers)

such as McKeon, Graham-Loftus and such deals. He told me I should go ahead and make an exchange, which I did. A letter was sent to all Modoc stockholders, in which it was explained to them the basis of the exchange and price, the current quotation on the exchange of the Italo stock, and a great many did come in with their certificates and exchanged it. In fact, outside of this block of 9800 shares, I mean including that, we got 98 or 99 per cent for the company. I purchased that Gillespie stock in the Modoc Oil Company. I spoke to Mr. Spalding about it and said I thought it was an attractive deal, and we should take it for several reasons, that I thought it would be profitable, and would be accomplishing exactly what I was directed to do for the company, that is, to acquire as much Modoc stock as possible, and I urged him to see what could be done to buy it. We figured we could advance about a fourth of it, so I wrote to San Francisco and was advised right away by Mr. Masoni, and Mr. Siens and Mr. Wilkes that they would put up the other money, which they did, that is the balance of the $6400, in equal shares. That $6400 was paid to Mr. Gillespie through Mr. Bill Cree, his attorney.

When I received the stock I sent it to San Francisco with instructions to issue Italo stock in exchange for the Modoc stock, and to issue it 1231 shares to A. G. Wilkes, the same to E. B. Siens and the same to Paul Masoni, the same to me or to the firm, with the exception of 100 shares which I let my secretary buy or gave it to her, and to send the balance back to me, which the company did. The parties who received the stock receipted for it.

(Testimony of Maurice M. Myers)

In July, 1928, I prepared an application to the Corporation Commissioner at the request of Mr. Wilkes for the Italo Company. That is the application that resulted in the permit of August 9. There were two or three discussions of the application before the filing, with the chief engineer, Mr. Abel. After the application was filed I saw Mr. Hahn, Mr. Wolch, Mr. Friedlander. I saw Mr. Hahn alone, and Mr. Wolch and Mr. Friedlander with Mr. Wilkes. These conferences were with reference to the application or the possible granting of the permit, and I wrote these two letters. Additional data was requested by the Corporation Commissioner's office subsequent to the filing of the application. I furnished that data, which consisted largely of engineering reports.

Prior to the granting of the permit we received money from the Italo office in San Francisco for payment upon the properties being acquired. About the date of the filing of the application, or perhaps a little before that, we began receiving funds from Fred Shingle, syndicate manager, or Shingle, Brown & Company. The funds were frequently transmitted to our office by telegraph. Quite often there was need of haste. There were a number of contracts, and they required punctual payment, and there were hectic days when everybody was very busy, and we would often get down to the last two or three days and I would wire or phone reminding them that a certain payment was due day after tomorrow or something like that. I know we had a lot of telephone conversations, and I am sure that we did get instructions regarding the payment of money. Those instructions that were signed would usually come from Fred Shingle, syndicate manager,

or perhaps Horace Brown of Shingle, Brown & Company, his partner.

Prior to the formation of the syndicate Mr. Wilkes would send the instructions as vice-president and general manager of the Italo. I carried out the instructions, whether they were telephone, telegraph or otherwise.

That is my signature on that check for $30,000, although I do not particularly recall it. I received word that $30,000 had been wired to me and was at the bank. I do not recall who gave me that information. I went to the bank and got the cashier's check, and went back to the office. After that Mr. Siens came in and said, "Let me have that check, that money which was wired to you this morning." He said, "I will give you my personal acknowledgement of the receipt of it as a temporary receipt until I give you a formal receipt." As Mr. Spalding said yesterday, there was talk about the Graham-Loftus commission, and in that connection I recall now that as soon as the Graham-Loftus deal was closed and announced in the papers there was a lineup in my outer office of not less than ten to twelve brokers, every curbstone broker in Los Angeles, it seemed to me, and in fact I told them to line up and I would take them in turn. It happened in this way: the Graham-Loftus contract was finally closed at $3,000,000. I recall especially that Mr. Wilkes figured for some time that it would be about three and a quarter million. The original asking price was three and a half million, as I recall it, and we got them down to $3,000,000, providing the Italo paid the commissions, and there was a clause inserted in the con-

tract at Mr. Irving Walker's insistence that all commissions be paid, including a certain Graydon Oliver. I recall that Mr. Siens mentioned the commission and that he would produce a receipt for me, and that in the meantime I would have this temporary receipt, just a personal card.

Subsequently I received a receipt for the $30,000. It was given to me by Mr. Siens shortly after that. I entered that receipt in my records in the final accounting, and remember showing it to Pete Marwick and Mitchell, the auditors. The receipt was signed by L. Wertheimer. This is the receipt signed L. Wertheimer. I believe there was more than one original of that receipt, and that one was filed with my accounting to the syndicate manager. I received that receipt from Mr. Siens, but I can't tell you just when, but I notice it bears date of August 10th and I presume that is when I got it. I do not know what became of the money or the check after it left my office in the possession of Mr. Spalding, other than I believe Mr. Siens said, "I wonder if one of you can go with me and cash this for me." Mr. Spalding volunteered to go over and cash it for him right away. I endorsed the check in my office. Mr. Siens delivered this receipt to me. I do not know where Mr. Siens got it or when it was signed or anything else.

The receipt was received in evidence and marked Exhibit YY, and is in substance as follows:

Release executed by L. Wertheimer for $30,000 releasing Italo Petroleum Corporation of America and Fred Shingle, Syndicate Manager, for services rendered in

(Testimony of Maurice M. Myers)

connection with Italo Petroleum Corporation of American and Graham-Loftus agreement. The release is dated August 10, 1928.

The Graham-Loftus Oil Company was represented by Mr. Irving Walker of the firm of Loeb, Walker & Loeb, as attorney. In my experience with oil companies, in the purchase of oil properties, a one per cent brokerage commission for the purchase and sale of property is a remarkably low commission on such a deal as that.

I wrote Exhibit XX and sent it to the Corporation Commissioner. Prior to that I had written other letters to the Corporation Commissioner, along the same lines. I took one copy of that letter to Mrs. Huston, the chief clerk for Mr. Wolch, and the other one I delivered personally to Mr. Friedlander's office. I subsequently learned that the permit was granted on August 9, 1928.

The provision in the Graham-Loftus contract for the payment of commissions is on page 31, paragraph 18-A, of Defendants' Exhibit HH, and is as follows:

Provides that Italo Petroleum Corporation of America shall pay any and all commissions due or to become due on the sale of the properties of the Graham-Loftus Oil Company to the Italo Petroleum Corporation of America and also all claims of Greydon Oliver for commissions.

I did not ask to be appointed trustee for the stock; I do not know exactly how it came about that I was appointed trustee under the permit. At one time Mr. Abel mentioned that they insisted upon a trusteeship in a bank or to name me, and I was reluctant about accepting the respon-

sibility, but I did not refuse it, and the permit came out in that form. The trusteeship was not completely closed for a couple of years. I rendered an accounting as two trustees, really; one was as trustee of the syndicate in the handling of the money, and the other was trustee for the company as to the 6,000,000 shares of stock. As trustee for the syndicate I handled over $3,000,000; it was close to $3,400,000, although some of the money was disbursed at San Francisco.

At the conclusion of my trusteeship, accountings were rendered to the company and to the syndicate. To the best of my knowledge and belief the accountings rendered by me as trustee to the syndicate and the company were true and correct accountings.

The remittances from Shingle, Brown & Company or from Fred Shingle, syndicate manager, were to apply on purchase contracts that had already been made. As such trustee I carried out to the best of my ability the contracts already entered into for the acquisition of properties by the Italo, both for the payment of money and the disbursing of stock. After the trusteeship was formed, my partner and associate lawyers and myself proceeded to carry out the contracts, checking title, making payments, securing conveyances, closing escrows, and so on, until the final payment on each of the properties was made and the conveyances were delivered. Many persons came into our office and exchanged their stock for Italo stock as provided for in the contract with the companies in which they were stockholders. It was awkward and slow to handle this matter, because all the stock that I held was in my name as trustee; that meant it had to be sent to San

Francisco to be issued in the name of some one without the word "trustee," in order to be negotiated by some one on the Exchange, if they wanted to sell it, or else people wanted the stock in their own names. The stock would be sent to the transfer agent in San Francisco and they would exchange it and very often it would be ten days or two weeks before the stock would get back. In order to facilitate the handling of the matter, trustee's certificates were sent to San Francisco to the transfer agent and broken up into smaller blocks of stock and placed in the name of E. M. Brown. Brown was not considered the owner of those stocks, but endorsed them and I put them in the safe deposit box along with the other trustee's stock. We used the small blocks of stock for the purpose of making exchanges, because with Mr. Brown's signature they were registered and negotiable and in perfectly good order, and it was unnecessary to send the stock to San Francisco. The transfer was complete at the time we turned those street certificates over.

I became a director of Italo Petroleum Corporation of America on October 16, 1928. Mr. Gordon, Mr. McLachlin, Mr. Lacy, Mr. Hugh Stewart, Mr. Chapin, Mr. Keehler and myself went to San Francisco to attend the directors' meeting. I had not known Mr. Lacy very well before, but he kept me up on the train until about two o'clock in the morning asking questions about the company and telling me something about what he hoped for. He was very optimistic and ambitious in his program, and he said, "The slate is to have you made a director tomorrow, and it is partly or principally because I have asked for it. I think we should have you, as the company's at-

torney, on the board." I was elected a director the next day. I attended most of the meetings of the board. My work, however, was almost altogether when little controversies came up or a settlement of some dispute, or occasionally I would be made a committee of one to handle some account or settlement of a bill or something of that sort. My only real participation in the meetings was in the legal or semi-legal matters. I was a director at the same time Mr. McLachlen was. At that meeting Mr. Stewart, Mr. Chapin and Mr. Lacy became directors, and Mr. Lacy became president. After McLachlen went on the executive committee he handled the minutes of the meetings of the executive committee. He would draw up a sketchy draft of the minutes, the outline of the facts, and whether he submitted them to anyone else before coming to me I don't know, but they would be sent in to me and I usually put them in a form which I thought looked a little better as corporate minutes and a little more legal. I resigned as director about the middle of 1930, and except for the period from October 16, 1928, to the date of my resignation I was not a director or officer of Italo Petroleum Corporation of America at any other time.

During the period of time that I acted as a director of the Italo Petroleum Corporation I did not have anything to do personally and I did not do anything in connection with the preparation of any circulars or form letters sent to the stockholders. During the time I was a director I did not have anything to do with the preparation and sending to the stockholders of any financial statements that might have been sent out, and during that time

(Testimony of Maurice M. Myers)

I did not see any of the books of the Italo Petroleum Corporation of America other than the minute book. I did not keep the minutes myself and never acted as secretary or in any other official capacity for the company.

During the time Spalding & Myers acted as attorneys for the Italo Company we received compensation from time to time for our services as attorneys. I do not recall how much money we received for our services, except that I recall receiving $5000 between April and the end of 1928, because my partner often complained to me about the loose way in which I was handling the matter and it was taking practically all of our time in the office and he thought I should have handled it in a more business-like, definite way, so far as the billing or charging for our services was concerned. Mr. Spalding always handled collections and billing and all of that matter in our other work, but because of his illness it was up to me to look after the matter. If it is correct that during a period of approximately twenty months $35,000 was paid to Spalding & Myers for legal services to the Italo Petroleum Corporation, I would not think that that was an exorbitant fee. In fact I am sure it was less than our actual cost of doing business. I would say that the expenses ran over $2000.00 a month, and about 75 per cent of the office work was devoted to the Italo Petroleum Corporation of America during that period of time, beginning in April or May, 1928, and continuing on through 1929. We received only money from the Italo Petroleum Corporation, but we received 62,500 units of McKeon stock from the McKeons, which was in two blocks, one for 32,500 units and another for 30,000 units.

(Testimony of Maurice M. Myers)

That stock was received in April and May, 1929. The 32,500 or 33,000 units block was divided between Mr. Spalding and myself, and the second block was divided partially between Mr. Spalding and myself. The first time I had any knowledge that I was going to acquire any stock from the McKeon Drilling Company was early in 1929. My partner had often asked me what I was going to do about having an understanding for a payment for our services. I felt as a result of the conversation with him that I should speak to the officers of the company, that is, to Mr. Lacy and Mr. Bob McKeon, who was then over in the office acting as general manager, and one afternoon when I was playing golf with Mr. Bob McKeon he said to me, "Maurice, you have done some very good work and we realize it, and I am going to see that you are well compensated, if I have to do it myself." I remember that very well, because I communicated that information to my partner. In substance Mr. Bob McKeon said, "Your work has been very satisfactory and we appreciate it. We know that you have done a lot of hard work and you have been badly compensated, you have not been adequately compensated, and I am going to see that you are, if I have to do it myself personally." He also mentioned at that time that a lot more work would be asked of us because at that time and for one or two months before we had been spending a great deal of time in the way of qualifying the Italo properties for the proposed McKeon Oil Company deal, which was then pending. I never knew the definite amount of stock we were to get until the second payment. Mr. McKeon told me that a substantial block of stock would be set aside by him alone, if necessary, out of his personal holdings.

(Testimony of Maurice M. Myers)

I did not know how much the stock would amount to until I got the last envelope from the McKeon office.

Other than the 63,000 units I received from the McKeon Drilling Company, I did not receive any other stock from the McKeons or the company. I told the auditors that I was going to submit the company a bill for $15,000 for acting as trustee, or that I would take stock of market value at that time, but I never did charge the company anything for acting as trustee. I was not a party to the $80,000 syndicate or to the big syndicate, and never did any legal work in connection with the formation of the $80,000 syndicate. We had nothing to do with the big syndicate agreement. After the permit was granted we went to San Francisco and I drew the two agreements, one between myself as trustee of the Italo Company, which in effect simply authorized me to enter into the other contract, and the other was a contract between Fred Shingle, syndicate manager, Shingle, Brown & Company as escrow holders, the Italo Company, and myself as trustee, and that was all after the syndicate had been formed. I never had any account with Mr. Wilkes, Mr. Cavanaugh or Mr. John McKeon for the sale of stock, nor did I have such with Shingle, Brown & Company a corporation, or partnership, or with any of the defendants in the case, and I did not have any stock account with any other individual. I had broker's accounts of my own in connection with my own personal stock, which included stocks other than the Italo Petroleum Corporation. I do not know anything about the $6,000 check drawn by Bacon and Brayton, payable to E. M. Brown, and endorsed on the back E. M. Brown

and Maurice C. Myers, except that that is my endorsement.

With reference to Exhibit 297, I know nothing about the Taber account or the E. M. Tropp account. I never had any account with either Tropp or Taber.

In 1930 or 1931, after the filing of my income tax statement, there was a letter sent to me for correction on this six or eight thousand dollar matter which I presume was furnished from these records, at least it was supposed to be sales from the McKeon stock, and I answered disclaiming any knowledge or liability and that is the last I heard of it. I never had any connection with the International Securities Company. I delivered some stock to the Farmers & Merchants National Bank for the account of the International Securities Company at the instruction of Shingle and Brown or Bob McKeon. I had a letter directing me to deliver 60,500 units of the McKeon stock into escrow in the Farmers & Merchants Bank, and that I could consider that letter of instructions to be a receipt for such amount of stock upon making such delivery into escrow. At that time the stock had never been delivered because the Italo Company was in default and had not made its payments to the McKeon Company, and extensions of time were asked for and received from the McKeon Company. The deal, in short, was not consummated by the delivery of stock by Italo to the McKeon Company. In fact, we considered that as really the closing of the deal, because up until that time it had been a matter of being in jeopardy, not knowing whether the McKeons would actually go through with the deal on account of the delay in complying with Italo's

(Testimony of Maurice M. Myers)

obligations. When I speak of the deal I mean the sale of the McKeon assets to Italo. When I speak of the McKeon stock, that means the stock of the Italo Company owned by the McKeon Company. The contracts pertaining to the Coalinga group of properties, that is, the Maine State, Zier, Penn-Coalinga, and I believe one other, were prepared in San Francisco by the firm of Wheeler & Wheeler. This is a letter I received from Wheleer and Wheeler relative to the properties, in which they advised me that they have examined the title thereto and find the title to be good and merchantable.

The letter was received in evidence and marked Exhibit ZZ.

Exhibit AAA is a letter dated June 26, 1929, from myself to Peat, Marwick, Mitchell & Company, relative to the account of Spalding & Myers with Italo Petroleum Corporation of America, stating that as of the close of business April 30, 1929, the Italo Company owed Spalding & Myers $13,000 and as of June 30, 1929, $15,000 for services rendered from September 1, 1928; further stating that when the trusteeship is terminated Myers proposes to ask for $15,000 for compensation as trustee.

Exhibit BBB is a memorandum by me for Mr. Wilkes, dated July 18, 1928, stating that Myers had been advised that Lou Gillespie had offered to sell Italo Company some Modoc stock for $1.00 per share, and that on the day after the agreement was signed by Gillespie and the directors he, contrary to agreement, bought 9000 shares of Modoc stock from a local woman at 60 cents per

share, to resell it at 90 cents per share. Believe that the stock can be bought for 65 cents per share and suggest that Gillespie be told that he had violated his agreement and that the stock was not needed; also stating that they now have some 5000 shares at an average price of 82 cents per share, and 2000 more at 65 cents per share practically promised.

Exhibit CCC is a letter dated January 23, 1929, from E. B. Siens to myself, asking for acknowledgment of the check for $1600 issued on December 19, 1928, and the January 18, 1929, check for $2000, concerning the stock purchases.

Reply of January 24, 1929, stating that the check of December 19, 1928, for $1600 represented one-fourth of the Gillespie Modoc stock, and stating that 9850 shares were bought for $5,910, plus $492.50 commission, and that the stock was divided equally between A. G. Wilkes, Paul Masoni, E. Byron Siens and Spalding & Myers.

I wrote this letter dated July 17, 1928, which is Exhibit DDD. The letter is addressed to Italo Petroleum Corporation of America, attention A. G. Wilkes, and states that the application was turned over to Abel, that Myers had had several conferences with Abel which were encouraging, and that unless the "gunmen" are stronger than Myers believes, no further alarm need be felt about the permit being granted. It refers to complaints filed by Rorex and Zannetti, that Hiler, a deputy corporation commissioner, offered to set the hearing, and Myers surprised him with the defense that could be offered, and stated that the application was in competent

and efficient hands and "don't know what is behind the filing of the complaints, but it is petty hijacking which should be stepped on or is a threat being used as a club by grafters. Probably the latter," and the letter urges a showdown.

With reference to the Wertheimer receipt for $30,000 as commission on the Graham-Loftus deal, I do not believe that I sent a copy of that receipt to Shingle, Brown & Company, but I do believe I sent it to or exhibited it to the auditor. I don't know where it is now. The auditors are Peat, Marwick, Mitchell & Company.

The brokers that I referred to as lining up in my office in connection with these various deals were oil brokers and not stock brokers.

I know that at one time by actual count I had drawn more than 2000 different contracts and agreements for the company. In connection with the proposed formation of the McKeon Oil Company, I prepared to draw some of the contracts, options and agreements to purchase the various properties and look into the reports on title and such things as that. The law firm of O'Melveny, Milliken, Tuller & Myers handled a good deal of that work also in connection with this matter, and I worked in conjunction with them constantly for months on that line of work. A report was prepared by the firm of O'Melveny, Tuller & Myers, addressed to the firm of Palmer & Company and to Cadwalder, Wickersham & Taft in New York, preliminarily reporting upon the properties of the Italo Corporation of America.

(Testimony of Maurice M. Myers)

This is a photostatic copy of the report that was prepared and sent.

This file of documents contains my accountings as trustee to Fred Shingle as syndicate manager.

The report of O'Melveny, Tuller & Myers was marked Exhibit FFF for identification, and the letter from Myers to Guy Graves, one of the attorneys engaged by the O'Melveny firm in connection with the mater, was marked Exhibit GGG.

Exhibit 122 is signed by me, and acknowledges the receipt from Shingle, Brown & Company of certain stock of the Italo Petroleum Corporation of America, held in escrow for the McKeon Drilling Company. At the time I signed that receipt I had a conversation with Raleigh McKeon at the McKeon offices in the Great Republic Life Building, Los Angeles, sometime around May 4, 1929. I went over to the office in answer to a telephone call to see Raleigh and he had a big envelope with stock in it. He handed me the receipt to sign and I started to sign it and saw the amount of stock, just glanced over it hurriedly, and I saw the last part of it, and I said, "Raleigh, that's a funny receipt." It said, as I recall it, "for organizing, financing, or otherwise promoting the interests of Italo Petroleum Corporation." I said, "That's not right, because I was not either an organizer or interested in the financing or promoting of the Italo Petroleum Corporation, and most of my work here has been for the McKeon Company in the last six months." He said in substance, "This is the receipt I am asked to have signed, and it is the same receipt that others are signing." I said, "Well, I guess it doesn't make any

(Testimony of Maurice M. Myers)

difference." Then I went back to my office and mentioned it to my partner, Spalding, and he said, "What did you sign it for?" or "What did it say?" and I said it was just a funny receipt. I said, "I don't know that it makes any difference. I would have signed any receipt." During the conversation with Raleigh McKeon I do not believe I asked him who drew the receipt or where the wording was secured.

I know now that I drew a similar receipt to that, being a receipt drawn just a few days prior to that for Frederic Vincent & Company. It was a receipt for two hundred and some-odd thousand units in order to close up the Vincent contract. Horace Brown and Bob McKeon both gave me directions to settle up the contract with Vincent & Company, and in so doing I included a paragraph which is in identical language with Exhibit 122. I found that document among the exhibits here.

At the termination of my trusteeship I had over 200,000 shares of one kind of stock left which I turned back to the company. I never entered into any agreement with any defendant in this case or anyone else to accept any secret profits from any deal or deals of any kind or nature in connection with the acquisition of any properties by the Italo Petroleum Corporation of America, and I sent no letters to any stockholders of the Italo Petroleum Corporation of America, and I never sent any financial statements to any stockholders of the Italo Petroleum Corporation of America, and I never sold any Italo Petroleum Corporation of America stock to the public generally.

(Testimony of Maurice M. Myers)

CROSS EXAMINATION

(By Mr. Wood:) With reference to the $30,000 check, I received word from the bank that the money was there and went over and got the check, and when I came back to my office Mr. Siens came in and asked for it, and he said he would give me a temporary receipt, and give me a formal receipt in a few days. My partner went to the bank and cashed it. So far as I know, that $30,000 check was not in the possession of Alfred G. Wilkes.

CROSS EXAMINATION

(By Mr. Simpson): Prior to the granting of the permit on August 9, 1928, the moneys turned over by Fred Shingle, syndicate manager, were turned over by him to be disbursed as directed by the officers and directors of the company. The same was true after the granting of the permit. The directions for disbursement of the money usually came from the company.

CROSS EXAMINATION

(By Mr. Redwine): I do not know at whose request I appeared before the Corporation Commissioner relative to the distribution of the 600,000 units of stock that Italo Petroleum Corporation of America had transferred to the Brownmoor Oil Company for its assets. At the time I appeared before the Corporation Commissioner in that respect on June 19, 1928, I did not know that that stock had already been distributed, and did not know anything about the distribution of the stock. All I know about it is what I have heard in the courtroom.

(Testimony of Maurice M. Myers)

I believe it was at my suggestion the Commissioner authorized the issuance of 575,000 units of stock and the withholding of 25,000 units. I was never the attorney for the Brownmoor Oil Company except in the matter of the application of the Italo, and I believe this particular request for distribution. I was never paid for my services in that regard.

In December, 1928, the Italo Petroleum Corporation of America was exchanging its stock for the Modoc stock. The par value of the Italo stock was $1.00 at that time. The market price of the stock was above par. I was at that time trustee for the Italo Corporation and had in my possession the stock as trustee to be distributed in the acquisition of the properties and stock of these oil companies.

Masoni, Siens and Wilkes were directors of the Italo Company at that time. I paid $6400 for 9850 shares of Modoc stock. I wrote to San Francisco and asked Siens, Masoni and Wilkes whether they cared to put up three-fourths of the needed money if my partner and I put up one-fourth. If I had had sufficient money at that time I would have bought it all myself. Wilkes, Siens and Masoni were willing to go into the deal and buy the stock with me. I bought the stock, as I have testified, by giving the check which is Exhibit 302, and the check to the broker for commission. We acquired the Modoc stock for approximately 60 cents a share. I then took some of the trustee certificates and forwarded them to San Francisco with the Modoc stock, with instructions to issue Italo stock to Masoni, Siens, Wilkes and myself, and each of us received 1231 units of Italo stock for our $1600

(Testimony of Maurice M. Myers)

cash that we each put in. The value of the Italo stock at that time according to the market price was more than we were paying for the Modoc stock. It is my recollection that the par of the common stock was about a dollar or a little bit more and the preferred something under a dollar, I don't remember what, but it was more than what we paid or I would not have bought the stock.

Q Why was it, Mr. Myers, if you needed the money from Mr. Masoni, Mr. Masoni did not send you the money for that stock until June 15, 1929, as is evidenced by exhibit his check?

A I know without looking that he did not send it down until later.

Q You know that he did not send it down until later. So you did have the money in your bank account to take care of Mr. Masoni's share of that purchase, did you, Mr. Myers?

A I don't know whether I got it from my partner or my father or where I got it, but I paid the full amount, $5910.00. The shares of Modoc stock were transferable for one share of preferred and one share of common stock of the Italo. I did not sell my stock and I do not know what price it was selling for at that time.

I did not receive any written instructions from anyone as to how, where or when the $30,000 check, Exhibit 329, should be distributed. I was the trustee and I knew that I was going to have to make an accounting for the distribution of this money. I received this $30,000 cashier's check. That money was syndicate money which I was holding in trust for the syndicate. I was to see to the best of my ability that the money was applied to the

(Testimony of Maurice M. Myers)

acquisition of the properties and interests described in the application. Siens came into my office and said, "I want that check, the money which was wired to you this morning. I will give you my own personal receipt until I get a formal receipt." At that time he was vice-president, I think of the company, very active, doing a great deal of work, and I was accustomed to following his directions, and I did then, and he did produce and give to me a receipt later. Siens told me that the $30,000 was a commission on the Graham-Loftus transaction. He procured a receipt which he gave me a few days later, being the one that is in evidence. The first receipt he gave me is Exhibit 332, and is addressed to Spalding & Myers, "Please deliver to bearer the check for $30,000. E. Byron Siens."

I do not know who was meant by the bearer. I do remember Mr. Siens saying, "I will give you this personal receipt, temporary receipt, and I will get you the formal receipt within a day or two."

I delivered the check to Mr. Siens at the time I received from him the receipt Exhibit 332. Later I received the receipt in evidence, signed by Mr. Wertheimer. I knew Wertheimer slightly in various Italo deals. This is the receipt from Wertheimer, Exhibit YY. It is my recollection that Mr. Siens brought that receipt to me. I don't think the receipt was prepared in my office. I do not know whether that receipt was prepared on August 10, 1928, or not, but it is my recollection that I received it shortly after that date. I only remember that Siens said he would produce a receipt and he did. To the best of my recollection it was

shortly after the delivery of the cashier's check to Mr. Siens, which was some time between August 6 and August 9, 1928.

Exhibit EEE is one of the accounts that I prepared and filed with the syndicate. This exhibit shows that on 8/9/28 I paid out "Commissions as directed, $30,000." In Exhibit F appears the following, "Spalding & Myers: Please deliver to bearer check for $30,000. E. Byron Siens." And then under that, "The above written on the reverse side of the personal card of E. Byron Siens." I evidently had not received Exhibit YY, the receipt of Mr. Wertheimer, at the time I sent in that report September 10, 1928. I do not know whether I drew the Wertheimer receipt or not.

Exhibit HH, which is the agreement between the Graham-Loftus people and the Italo Petroleum Corporation of America, was reached in July prior to the filing of the application with the Corporation Commissioner, and it is my belief that it was signed in blank, although it was dated August 13th. The deal was announced and considered finally settled about a month prior to that time. It is not customary to pay commissions before the final deal is consummated. A $10,000 commission was paid to Graydon Oliver on the Graham-Loftus deal. Graydon Oliver was one of the many brokers who claimed to have been very helpful and very much a part in closing this deal, and he asked for $75,000, which made it very bad, because he was only the Graham-Loftus end of it and had only done some work for the Graham-Loftus and with this man Fyfe. That is the way it was told to me. He

(Testimony of Maurice M. Myers)

asked for $75,000 and the reason that it was rather difficult for me was that the contract required the settlement of his account regardless of what that might be. There was no sum fixed. That was the first time I had ever seen Oliver, and I asked him first of all if he had a broker's license. He said he had not. I asked him how much work he had actually done on it and he said very little, a day or two. I think that he had talked to Mr. Loftus or Mr. Graham once. So finally I said to him, "Well, it seems to me for a young engineer like you that $10,000 would be a very adequate compensation for a day or two's work and only on one side at that." He refused to take it, however, and he came back a couple of times before I finally gave him $5,000 about the middle of August and $5,000 some time later, and got his receipt.

These two checks, dated September 28, 1928, and November 1, 1928, each for $5000, are the checks that I delivered to Mr. Oliver.

They were received in evidence and marked Exhibit 333.

I had had two or three conversations with Oliver and one with his attorney prior to the date of the first check.

This is the signature of Alfred G. Wilkes and that of E. M. Brown.

The exhibit was received in evidence and marked Exhibit 334, and is dated July 3, 1928, and is in substance as follows: It is signed by Wilkes, Graydon Oliver and E. M. Brown, and agrees to pay E. M. Brown and Graydon Oliver $10,000 commission on the Graham-

Loftus deal, together with a letter dated September 28, 1929, offering to accept $10,000 by payment of $5000 September 28, 1928, and the balance by November 1, 1928.

At the time I received the 62,500 units of stock from the McKeons I considered it not only as payment for services to the Italo Corporation, but as payment for services of the work which I had done, my firm, from about October or November of 1928 for the McKeon Oil Company and a lot of work still remaining to be done, as I was told and knew, but more than anything else I considered it as compensationg us for a tremendous lot of work which had been done with very little compensation from the Italo Company.

Q Well, now, I want to refer to a particular portion of the testimony that was given by your law partner, Mr. Spalding. He testified, page 4004 of the transcript as follows: "Q—Do you know whether or not that stock was the stock formerly held by Maurice C. Myers as trustee received under the permit of the Corporation Commissioner, and as part of the 12,000,000 shares? A—I do not, no. I know that it came from the McKeon Drilling Company, and I knew it by reason of the fact that the document, not only satisfied what the Italo Petroleum Corporation owed us, but also a considerable bill that we had against the McKeon Drilling Company. It was settled at one time.

Was that testimony truthful?

A I am not at all sure that it is. We did a lot of work for the McKeon Drilling Company, and I know that later, about that time, perhaps the end of 1928, or

(Testimony of Maurice M. Myers)

some time early in 1929 we had a mild argument about a bill, but I don't know that there was any unpaid bill from the McKeon Company at that time. He might have been referring to the McKeon Oil Company, and I presume he was.

Q According to the testimony of Mr. Spalding, this stock satisfied what the Italo Petroleum Corporation owed you?

A Mr. Spalding didn't keep the books on all matters except this Italo matter, and it is possible or likely that there was an account and that he charged it off to them. As to that I have never even looked at our books.

Q Now let me ask you this question: Did you consider the payment of that 62,500 units of stock to Spalding & Myers as payment to that law firm of the money that the Italo Petroleum Corporation of America owed them for legal services?

A That the Italo Company owed us?

Q Yes.

A Up to that time?

Q Yes.

A Yes, I did.

Q. And you considered that the payment of that stock was the payment in full for those services up to that time?

A. Well, I don't know. Let me put it this way:—

This document dated November 1, 1929, was rendered by us to the Italo Petroleum Corporation of America.

It was received in evidence and marked Exhibit 335, and is a carbon copy of a letter dated November 12, 1929, enclosing a statement for services rendered by Spalding

(Testimony of Maurice M. Myers)

& Myers for Italo Petroleum Corporation of America up to November 1, 1929, for $19,000, with a credit of $2000, leaving a balance of $17,000.

That statement was rendered in the end of 1929, and apparently represents the work for 1929, but I think the statement itself shows it was meant to indicate that all work done to date, from the beginning of 1928 until the end of 1929 was included, and I meant to summarize there the principal jobs or work which we handled, because, as a matter of fact, there was still some unfinished business, and there always was unfinished business.

This is my signature on this letter dated February 14, 1930, and I rendered the bill enclosed therewith, as well as the letter and bill dated September 10, 1929.

The documents were received in evidence and marked Exhibits 336 and 337.

Exhibit 335 is as follows:

"November 12, 1929.

Italo Petroleum Corporation of America,
Los Angeles, California.

Gentlemen:

We are today submitting a statement of our account for professional services. This is the first statement rendered by us since March 8, 1929 because we were requested to withhold our bill until more pressing obligations of the company could be satisfied and also because we volunteered to extend this credit at the time

(Testimony of Maurice M. Myers)

loans were asked and received from other officers and directors. It is requested that some payment be made on account at this time and that the balance be evidenced by a promissory note payable within a reasonable time.

Very truly yours,

Spalding & Myers"

Attached to said letter is a bill from Spalding & Myers to Italo Petroleum Corporation dated November 1, 1929 for professional services to November 1, 1929 for $19,000; paid October 3, 1929, $2000.00, balance due $17,000.

Exhibit 336 is as follows:

"February 14, 1930.

Italo Petroleum Corporation of America,
Los Angeles, California.

Gentlemen:

You will recall that a statement of our account was recently made as of November 1, 1929. It was then agreed that we should receive a retainer fee of $500.00 per month for which you would receive credit on our statements rendered from time to time for professional services. We believe that a fair and reasonable charge for all our services during the past three months, November, December and January, is $3000.00. Such a statement is enclosed for your consideration. A detailed

description of our work does not accompany this statement because we believe that you will realize that a considerable portion of the time of this office is devoted every day to Italo matters but such a summary can and will be prepared and submitted to you upon request.

Very truly yours,

SPALDING & MYERS

By M. C. Myers."

Enclosed was a bill for professional services from November 1, 1929 to February 1, 1930 for $3000.00, with credits of $1500.00 retainer fees for November, December and January, leaving a balance of %1500.00.

Exhibit 337 is as follows:

"September 10, 1929.

John B. DeMaria, President,
Italo Petroleum Corporation of America,
Los Angeles, California.

Dear Sir:

Request is made that you present the enclosed statement for my services as trustee at the next meeting of your Board of Directors. Your attention is invited to the enclosed copy of my letter of January 26, 1929 in connection with the audit of the accounts of your company by Peate, Marwick, Mitchell & Company. You will note that I agree to accept stock of your company of the

(Testimony of Maurice M. Myers)

market value of $15,000 in lieu of such payment in cash. I now repeat such offer provided such stock can be delivered as I believe it can as compensation for such services under the terms of your permit from the Corporation Commissioner.

Very truly yours,

MAURICE C. MYERS"

Attached is a bill dated September 10, 1929 for services rendered by Maurice C. Myers as trustee for Italo Petroleum Corporation of America from June 19, 1928 to September 10, 1929 for $15,000.

Exhibit 338 is a letter dated September 1, 1929 addressed to John B. DeMaria, President Italo Petroleum Corporation of America, enclosing a statement to be submitted to the Board of Directors and stating that no statement has been submitted since March 8, 1929, and that this was done to accommodate the company at the request of officials when the income was needed for other services. The bill is for $17,000 for services to September 1, 1929 in the sum of $17,000.00.

Exhibit 339 is a letter dated March 15, 1929 to Maurice C. Myers from E. P. Lyons, Comptroller Italo Petroleum Corporation enclosing a check for $1,553.05 and stating that it has been the policy of the company to make payments to Myers on account and that Lyons had incomplete records due to not having invoices from Spalding & Myers showing ordinary detail of charges

and requesting a statement of the account to September 31, 1929.

Attached to said letter is a carbon copy of a reply dated March 16, 1929 addressed to E. P. Lyons, signed Maurice C. Myers acknowledging the receipt of the check for $1553.05 representing advances by Spalding & Myers in excess of receipts and stating that a statement of the account for legal services to December 31, 1928 would be submitted.

REDIRECT EXAMINATION

I wrote the original of this letter at the request of Horace Brown and Bob McKeon.

With respect to the purchase of the Gillespie stock by Wilkes, Masoni, Siens and myself, we each contributed one-fourth of the purchase price. My directions from the Italo Company were to secure as much Modoc stock as we could. That 9850 shares of Modoc stock was purchased by Gillespie in violation of his agreement made with the other directors of the Modoc Company, and he refused to exchange the Modoc stock for the Italo stock on the ratio provided. Gillespie endeavored to sell the stock to the company at $1.00 per share after having asked more originally. He never communicated with me personally, and in my judgment the only way to acquire that stock was by purchase and not by trade, and the Italo Company had no money at that time with which to buy the stock. The trustee had stock to exchange for the Modoc stock. The syndicate had money but it wasn't using the money, and the permit and the contract of the syndicate provided that it should meet the required cash

(Testimony of Maurice M. Myers)

obligations to reduce the total indebtedness to $2,750,000. That left the one way only to acquire the outstanding stock by exchange. The reason I purchased the Gillespie block of 9850 shares was because I couldn't get it any other way for the company. The Modoc stock that was purchased by me from Gillespie and exchanged for the Italo stock was exchanged on the same basis that other Modoc stockholders exchanged their stock for Italo stock.

When we were attorneys for the Italo Company we maintained one office for the use of the Italo Company's officials. My memory is not very clear as to matters that happened five years ago.

The letter previously identified by the witness was received in evidence and marked Exhibit HHH. It is a carbon copy of a letter addressed to Shingle, Brown & Company, dated December 12, 1928, from Maurice C. Myers, advising Shingle, Brown & Company that as escrow holders of the McKeon Drilling Company stock (Italo stock) they are authorized to deliver certain stock to Frederic Vincent & Company on certain terms and conditions to be performed by Frederic Vincent & Company, and upon the receipt of certain receipts to be executed by Frederic Vincent & Company releasing Italo Petroleum Corporation of America, Shingle, Brown & Company, McKeon Drilling Company, Fred Shingle, syndicate manager, A. G. Wilkes, E. Byron Siens, and Maurice C. Myers and the officers and directors of the said corporation from liability, and also instructing Shingle, Brown & Company to obtain from Frederic Vincent & Company a receipt acknowledging the receipt

from the McKeon Drilling Company of certain shares of Italo Petroleum Corporation of America stock, which said receipt should recite: "That it is in full of all demands and in complete settlement and satisfaction of and for all services of Frederic Vincent & Company and the members and employees of said company in connection with or affecting in any manner the Italo Petroleum Corporation of America, and in particular all services of Frederic Vincent & Company, its members and employees in organizing, financing and otherwise promoting said Italo Petroleum Corporation of America."

When the memorandum from which this letter was dictated was given to me by either Horace Brown or Robert McKeon, I was told by them that Vincent had to be out and this was the way to get him out.

The wording in Exhibit HHH, "all services of Frederic Vincent & Company, its members and employees, in organizing, financing and otherwise promoting said Italo Petroleum Corporation of America," is my language, as is the whole letter.

RECROSS EXAMINATION

I believe I received this telegram, Exhibit 340.

REDIRECT EXAMINATION

Exhibit 340 probably means that I was supposed to try again to get Gillespie to exchange the stock, which I presume I did.

Before the indictment was returned in this case I was visited by the Post Office Inspectors and turned over to them all information that I had connected with the Italo

Petroleum Corporation and its affairs, and told them that my files were open to them and they could help themselves. They took away great stacks of files from my office.

In 1931 I received a communication from the Post Office Inspectors to the effect that the files they had taken from me were in a certain location here in the Federal Building and were open to inspection by myself at reasonable times. I did not examine the files until about a week or two after the trial began, and it did not appear to me then that the files were as complete as when they were taken. I have looked for and have not found some papers that I hoped to find.

RECROSS EXAMINATION

It might possibly have been one of the accountants that took some of the files and papers.

WILLIAM J. CAVANAUGH,

a witness on his own behalf, testified under oath as follows:

For the last few months I have been associated with Mr. Wilkes in the wholesale distribution of gasoline in Northern California. I have known Mr. Wilkes since I was about thirteen years old, and I am now thirty-two years of age. I am a relative of Mr. Wilkes by marriage; he married my first cousin. At the present time I am an employee of Mr. Wilkes in a closed corporation.

I was educated in the schools of San Francisco and also attended Stanford University, where I took a course in petroleum engineering and majored in geology, but

(Testimony of William J. Cavanaugh)

did not graduate. After leaving Stanford I worked with Eric Pedley in a partnership, selling real estate in a subdivision at Santa Monica. That was about 1923. I worked there about a year, and we sold all of the subdivision, in what is known as Santa Monica Heights. My partner and I made about $120,000. After that I accompanied Jack McKeon to Honolulu, where he went on account of his health. Upon my return from Honolulu I resumed my activities in oil lands and leases with my partner, Mr. Pedley, and continued to do that until about the middle of 1925, when I joined Mr. Wilkes in the management of his brother's theatrical business, and continued in that until shortly after the first of 1927. Mr. Wilkes went to Canada in 1927, and prior to his going there we decided we wanted to get back in the oil business, and I told him I thought I would come down to Los Angeles, which I did, and became interested with a man by the name of Bray in what was known as the Doheny-Stone Drilling Company, manufacturing a new type of rotary drilling equipment, particularly adapted to deep well drilling and drilling through high gas pressures. I came to Los Angeles in the early fall or late summer of 1927 and spent a great deal of time in and around the shops of this company. I was also at the same time on the lookout for attractive oil properties, and continued on doing that until the winter of 1927, when I went to Signal Hill and went to work as a roughneck on one of the Doheny-Stone drills. That was the first well they drilled with that equipment at Signal Hill.

Mr. Wilkes returned from Canada in the fall and I saw him in Los Angeles in October, 1927. He told me

(Testimony of William J. Cavanaugh)

that he had made a connection in San Francisco with an oil company known as the Italo-American Oil Company, that he had a job to do in reorganizing the company and putting it in shape, and he did not know how long it would take him to accomplish this but when he got through, regardless of what happened, he was going back into the oil business on his own, and he asked me if I had been in touch with any properties down here. I told him I had and named a few of them. I used to see Jack McKeon quite often and talk to him about the oil properties. Every time Wilkes came to Los Angeles he would call me and let me know he was here and I would see him.

I first heard of the Brownmoor Oil Company shortly after the first of the year 1928, from Jack McKeon. He told me particularly about this section of land they had under lease in the Kern River Front field, and also about some leases they had in the Los Angeles basin and a refinery on Signal Hill. He said he thought it was a particularly good property, that it was surrounded by good production, owned by the major companies, and he thought an attractive deal could be made with them because they were not properly financed. They had some production and they had a well or two about to be drilled, that is, the Brownmoor Oil Company did.

About two weeks later I saw Mr. Wilkes and told him about the Brownmoor property, that I thought it was a property he would be interested in. It was located in a part of the country that he was very familiar with and where he had acquired property some time ago that had

been the start of successful companies that he had been associated with.

I first met Mr. Siens in Mr. McKeon's office in the Richfield building toward the end of February, 1928. That was after I had told Mr. Wilkes about the Brownmoor properties and he had told me that he was not quite ready at that time to acquire any properties for the Italo Company of San Francisco, but that in the near future he would be glad to meet Mr. Siens and talk to him about it. Subsequently Mr. Wilkes asked me if in the event of making a deal if I had made any arrangements with Mr. Siens as to compensation. He told me and impressed upon me that the Italo Company in acquiring a property would not pay any commission. Mr. Wilkes and Mr. Siens discussed the Brownmoor deal together in Mr. Siens office in the Roosevelt Building about the end of February, 1928. I was present at the conversation. There was just a general discussion of the assets of the company, what they owned and what they were doing. I was not present at any further conversation between Mr. Siens and Mr. Wilkes relative to the Brownmoor deal.

Mr. Siens told me during the conversation that we had had before his meeting with Mr. Wilkes that there was a block of 100,000 shares of Brownmoor stock set aside for financing the company, and that if I was successful in arranging the deal or doing anything that would result in the financing of this company, this stock would become my property. Afterwards I received $72,000 from Mr. Siens in payment for my services.

(Testimony of William J. Cavanaugh)

Subsequently and in June, 1928, Mr. Wilkes told me that he was very busy in San Francisco, that he had reorganized this company, they were acquiring additional properties, and he was forced to spend a lot of time away from the office up there. He asked me if I would come to San Francisco with him and assist him in this work, handling the details and assisting him in the negotiation of these properties.

In 1929 I formed a partnership with Mr. Wilkes, the one that has been referred to here as the Wilkes-Cavanaugh partnership. Mr. Wilkes at that time had been working pretty hard for a long while and had had a couple of bad heart attacks. He came to me and said that he was going to be away a lot and busy working on a reorganization of the Italo with Jack McKeon. He told me that we should form a partnership, in case anything should happen to him that there would be some one to carry on his business. The partnership was engaged in the business of trading in oil properties, and I did a lot of trading in securities. Subsequently the partnership became inactive about the summer of 1930. I did not share any of the $72,000 with Mr. Wilkes, and did not invest it in this partnership.

In 1931 I went to work for the firm of Walsh, O'Connor & Company, members of the New York Stock Exchange, with an office located in San Francisco. I have had experience in the brokerage business.

David Garvey is my step-father. The account of David Garvey on the books of Shingle, Brown & Company was my personal account. It was originally opened

for me by Mr. Wilkes under his name, but about the time or just before the time I arrived in San Francisco it was changed to my step-father's name. I used some of the $72,000 to operate on the stock market under the name of David Garvey, and had other acounts around San Francisco.

With reference to the account of David Garvey on the books of the Montgomery Investment Company, I know this: that I heard quite a few discussions between Mr. Wilkes, Mr. Perata and Mr. Masoni about this account, and about funds being in there pending a settlement with Mr. Vincent, to use separate and apart from my account. That was all I knew about it.

I had a conversation with Mr. Fahey in September, 1931, relative to that $72,000. Fahey came into the office of Walsh, O'Connor & Company and introduced himself, and we talked for a few moments. He started to question me about this $72,000, and asked me if I received it. I told him yes. He then started to ask me as to various amounts of money and stock which had passed through the books of the Wilkes-Cavanaugh partnership belonging to the McKeon Drilling Company. I told him I could not recall those various amounts, but that the books were over in the office and he was welcome to go over there and examine them and get any information he wanted.

My next converastion was about two or three days before Armistice Day of 1931. Mr. Fahey and Mr. Marles came into my office at Walsh, O'Connor & Company. It was quite a busy office and we retired to a small

(Testimony of William J. Cavanaugh)

room that we have there to interview customers. Marles didn't have much to say. Mr. Fahey said, "Mr. Cavanaugh, you are a young man, you are newly married, you have what may be a very promising career in front of you. Did you ever stop to consider what an indictment might do to you?" I said, "I have never considered an indictment in connection with myself at any time." He said, "Unless you get on the witness-stand and testify that that $72,000 in the Brownmoor deal actually went to Mr. Wilkes, and not to you, you are going to be indicted." I told him that I was perfectly willing to get on the stand and testify to the truth, indictment or not, and invited him to leave the office. I now testify that Mr. Wilkes absolutely did not participate at all in the $72,000, and I had nothing to do with the negotiations for the purchase of the McKeon Drilling Company properties, was never an officer of the Italo Company. I was present at informal discussions when the Italo was interested in the purchase of some oil properties. I was not present at any conversations where the Brownmoor purchase was discussed, except as I have testified. I never received any stock or cash as a commission or bonus of any kind growing out of the purchase by the Italo Petroleum Corporation of America of the McKeon Drilling Company properties.

Referring to Exhibit 297, realization, William Cavanaugh, $94,138.74, I never received that money. With reference to item No. 46, Exhibit 297, "Sold in name of Egan Tropp for account of A. G. Wilkes, Cavanaugh, Myers and J. McKeon, 305,180 shares," I know that shortly after this partnership was formed Mr. McKeon

(Testimony of William J. Cavanaugh)

went to New York, working on the reorganization of the Italo Company. He expected to be there a long time. Wilkes was working with him in that connection. We had a great many expenses that we had to pay out here. This stock was placed at our disposal by Jack McKeon. We paid a good many thousand dollars in options, engineers' fees, auditors and attorneys' fees. This stock went through our partnership funds. That is, all of the stock that appeared on the books of Wilkes and Cavanaugh was the property of John McKeon and did not belong to either Wilkes or myself. I was told to be very careful in the handling of those accounts, sums of money or stock, and to keep a very careful accounting, as we would have to give this accounting to Mr. McKeon at some future date.

I have seen this letter dated December 4, 1928. At that time Wilkes was either out of town or out of the office, and I probably received the letter, it being dated December 24th instead of December 4, 1928.

The letter was received in evidence and marked Exhibit III, and is identical with Exhibit No. ....., the letter set up in the 12th overt act of count 15 of the indictment.

I did not receive this letter dated April 17, 1929. I saw it after it was prepared in the office of Shingle, Brown & Company and read it.

With reference to line 22, Exhibit 297, "Sold in name of Egan Tropp for account of Wilkes, Cavanaugh, Myers and J. McKeon, 100,000 shares," I will say that I don't know what Mr. Myers' name is in there for.

(Testimony of William J. Cavanaugh)

Mr. Tropp was handling as a broker the sale of this stock in Los Angeles. The stock was sent to Los Angeles from the McKeon escrow by Shingle, Brown & Company. The proceeds received by Mr. Tropp from the sale of that stock went through the books of Wilkes and Cavanaugh. At that time Wilkes was out here in California and McKeon was in New York. They were both working on the reorganization of Italo and the formation of the McKeon Oil Company. We were to give an accounting to Mr. McKeon of all this stock that had been placed at Mr. Wilkes' order in the Shingle, Brown escrow. After the crash and after the end of the year 1929 the organization of this company fell through, and we wound up without any money, likewise Mr. McKeon, and Mr. Wilkes and Mr. McKeon had an accounting and it was decided between them that it was just money lost.

The letter identified by the witness is dated April 17, 1929, and was received in evidence and marked Exhibit JJJ, and is in substance as follows:

Letter dated April 17, 1929, to Alfred G. Wilkes from L. J. Byers concerning the distribution of stock and stating that 6,250 shares of no par stock is being mailed to Wilkes.

I prepared this document and it was written by me. Exhibit JJJ was prepared in accordance with this memorandum.

(Testimony of William J. Cavanaugh)

The document was marked Exhibit KKK, dated April 17, 1929, and reads as follows:

"Dear A. G.: Following is statement of Shingle's:

Received	Common	Preferred
1/2 of McKeon Drilling Co. 961,511	480,755	
Vincent Escrow	2,695	2,070
	483,450	2,070
Delivered		
2/19 to Wells Fargo sent to L. A.	200,000	
3/6 sold by S. B.	16,667	
3/6 sold by S. B.	10,000	
3/13 sent to L. A.	100,000	
#Reserved for Gordon and Shores	56,250	
4/17 Delivered to W. J. C.	100,533	2,070
	483,450	
	56,250	
	427,250	

#You will note they are still holding your half of Shores stock which is 25,000 shares."

I do not know whether Mr. Shores ever received any of that stock that has been referred to in the letters as being held for the Gordon and Shores account. I did not deliver any to him. Mr. Gordon received the amount

(Testimony of William J. Cavanaugh)

that was reserved in that escrow for him. Mr. Wilkes told me it had been delivered to Gordon. That 200,000 shares delivered to the Wells Fargo Bank was security on a loan. The 100,000 sent to Los Angeles March 13th was sold. I received the 100,533 shares of common and 2070 shares of preferred on April 17th, and receipted for it. My best recollection is I sent it to Mr. Wilkes in Los Angeles, although I may have sold some in San Francisco. If I did the proceeds went into the partnership in the usual course of business. I was never an officer of the Italo Petroleum Company. During the months of August, September and October, 1928, I spent almost every day in the offices of the Italo Petroleum Corporation of America.

With reference to the exhibits introduced in evidence, consisting of letters, pamphlets and certified accountant's statements, I am acquainted with those that were sent out during the time I was there, that is, during August, September and October, 1928, and no later than that. To the best of my knowledge, all of the matters contained in those exhibits were true and none of them contain any fraudulent statements or representations, nor could they be construed as concealing any material facts for any fraudulent purpose. I never had any secret arrangement or agreement at any time with any of the officers of any of the corporations in this case whereby I was to receive a secret profit or bonus or anything like that.

(Testimony of William J. Cavanaugh)

CROSS EXAMINATION

(By Mr. Abrahams:) When I first talked with John McKeon about the Brownmoor properties, he knew that I was on the lookout for properties because I had told him so. I asked him when I first came down if any properties were presented to the Richfield that were not interested in I would like to know about them and I would consider it a favor if he would let me know. At that time I do not believe the Italo Petroleum Corporation of America had been organized. Mr. Wilkes was at that time connected with the Italo-American Corporation. At that time Mr. McKeon suggested to me that the Brownmoor property was a good property and he believed it could be bought at a reasonable price, but he did not suggest that I see Mr. Wilkes about it. I knew Mr. Wilkes might be interested in buying the property for himself.

I was not an officer or director or any way connected with the Brownmoor Company or the Monrovia Oil Company, either No. 1 or No. 2, and prior to that time was not familiar with the Brownmoor properties, and knew nothing about their location.

Prior to that time I had known Mr. McKeon since I was about thirteen years old, and had business dealings with him in connection with the subdivision of this property at Santa Monica. We had a contract to sell that property, from the fee owners, Mr. McKeon, Mr. Wilkes and Mr. Doyle, and Eric Pedley and myself subdivided it and sold it.

The transaction between the Italo Company and the Brownmoor Company was one whereby the Italo Com-

pany traded stock for the assets of the Brownmoor Oil Company. I had been promised and was to receive 100,000 shares of the Brownmoor stock in consideration of having brought the parties together; it was in the nature of a brokerage transaction. That stock was paid to me by Mr. Siens, but it was not paid by the Italo Company. It was paid by the Brownmoor Company through Mr. Siens. I had nothing to do with fixing the amount of stock that the Italo was to transfer to the Brownmoor corporation for its assets. I didn't enter into those negotiations at all. I knew very little about the assets of the Italo-American or the Italo Petroleum Corporation of America. I did not take any part in the transfer of assets of the Italo-American Corporation to the Italo Petroleum Corporation of America, and had no connection with it at all. As an oil man I know there would be a relationship between the assets and the number of shares of stock that were outstanding, as to the proper way of determining how much stock should be issued or paid for any new property that was coming in.

The firm of Wilkes & Cavanaugh was not in existence at the time the contract was made between the McKeon Drilling Company and the Italo Company on July 5, 1928. At that time I had no relationship at all with the McKeon Drilling Company and was not an employee of that concern, and had no relationship with the Italo Corporation of America. Afterwards I was an assistant to Mr. Wilkes in the Italo Petroleum Corporation; I was an employee but was not an officer or director. I did not vote in the transaction whereby the Italo acquired the McKeon properties, and never received any stock from the

(Testimony of William J. Cavanaugh)

McKeons or anybody else in consideration of my inducing anybody else to vote for that transaction. I was Mr. Wilkes' asistant on October 15, 1928, when the McKeon properties were turned over to the Italo. At that time the properties belonging to the McKeon Drilling Company were turned over to the possession of the Italo, and from that time forward the Italo reaped the benefit of the income from that property, but I had nothing to do with the taking over of those properties. As Mr. Wilkes' assistant I handled details around the office, as he was away a great deal of the time. I acted more as a secretary and looked after the office and the business, but didn't exercise any authority.

I may have been present at one or two conversations between Mr. Wilkes and Mr. McKeon with respect to the organizing of this new McKeon Oil Company, but I would not say that I was present at any time when Mr. McKeon stated to Mr. Wilkes the purposes for which the stock belonging to the McKeons or the McKeon Drilling Company was to be used and put at Mr. Wilkes' disposal, but I knew that that was the understanding. I knew that it was at Mr. Wilkes' disposal but did not know the purpose for which it was to be used. I received that information from Mr. Wilkes. Mr. Wilkes told me that that stock was to be used in conection with the financing of the reorganization of the Italo Petroleum Corporation or the forming of this new larger McKeon Oil Company. By that I refer to the stock that was turned over to the Wilkes-Cavanaugh partnership. It was also to be used for payment of deposits on properties that were taken under contract. Mr. Wilkes had something to do

(Testimony of William J. Cavanaugh)

with the taking over of the option on the properties known as the Dabney-Johnson properties, but I did not have anything to do with that. Mrs. Lyle kept the books of the Wilkes & Cavanaugh partnership. I had nothing to do with the keeping of the books or making any entries therein, although the books were in the office.

CROSS EXAMINATION

(By Mr. Redwine) I was familiar with the David Garvey account on the books of Shingle, Brown & Company; that was my account. I put the money in it and drew the money out of it, but not as an individual. It was mine. I had control of that account. I did not give any instructions to deposit the check made out by Frederic Vincent & Company payable to the Montgomery Investment Company in the David Garvey account. I did not give any instructions to transfer $25,000 from that account to the credit of Paul Masoni in the big syndicate. The same is true with reference to the $25,000 transferred to the credit of Perata. I had nothing to do with the David Garvey account in the Montgomery Investment Company, and knew nothing about it.

Q I show you Exhibit No. 185, which is the ledger sheets of the Montgomery Investment Company, which pertains to that account. I will ask you to look at the entries on that ledger sheet and see whether or not you had anything to do with that particular account.

A No, sir.

Q You know nothing of that account or the transactions concerning which this account purports to give information?

A No, sir.

(Testimony of William J. Cavanaugh)

I had another account with Shingle, Brown & Company known as the David Garvey account. That was my account, but not the one with the Montgomery Investment Company.

When the Wilkes & Cavanaugh partnership was started in 1929, in the spring, the books showed it to have taken effect as of January 1, 1929. Mrs. Lyle kept the books of the partnership and obtained the information for keeping the books from either Mr. Wilkes or myself. The profits of the partnership were to be divided two-thirds to Mr. Wilkes and one-third to me.

Q And was that done with profits of the partnership?

A Well, as it happened, there were no profits.

Q There were no profits during the year 1929?

A No, I would not say that. There probably were.

Q Well, then there were profits?

A Yes, at the end of '29.

Certain McKeon stocks were sold through the partnership. I do not know the exact figure, but it could have been approximately 311,180 shares. That stock was placed in the hands of the partnership by John McKeon. Some of it was sold through M. Taber and some through Tropp.

Q Isn't it a further fact that the partnership, that there was received as the result of the sale of this stock from Leib-Keystone Company some $31,834.77?

A I don't remember the exact amount, but it could be that, yes.

Q Isn't it further a fact that this account received from Bacon & Brayton, who were brokers, the sum of $432,233?

(Testimony of William J. Cavanaugh)

A That could be, yes.

Q That would make a total, would it not, of some $464,107.77?

A It could be, very easily.

It is not a fact that the Wilkes-Cavanaugh partnership received $219,556.37. It went into the books, but we as a partnership or as individuals did not receive it. I did not receive any of that money, not a cent of it. I do not recall that $6000 of the $464,107.77 received from the sale of the stock went to the defendant Maurice Myers. Mr. Myers had nothing to do with these transactions at all. I have no knowledge or information concerning that $6000. The partnership received the money from the sale of this stock, but the individual partners did not. The money went into the partnership and stayed there, and after the crash in 1929 and 1930 we were all broke. We lost the money in 1930 as a result of the stock market crash in 1929. However, I believe in 1929 the partnership did have a profit. No part of that profit was from the $219,556.37 which the Wilkes-Cavanaugh partnership received as a result of the sale of the John McKeon stock.

Q Well, at the end of 1929 you had a financial statement prepared, did you not?

A Yes, I suppose so. I don't remember.

Q And is this not the financial report or statement that was prepared by Mrs. Lyle?

A It probably is.

Q You had that prepared by Mrs. Lyle, didn't you?

A Evidently.

(Testimony of William J. Cavanaugh)

The document was received in evidence and marked Exhibit 341, over the objection of the defendants that it was irrelevant, immaterial, incompetent, no proper foundation laid, and it had not been shown to be correct in any particular, or that it was made up from any record which is binding upon any one or more of the defendants.

Objection overruled. Exception. The exhibit purported to be a financial report of the Wilkes-Cavanaugh partnership for the year 1929, showing the assets and liabilities of the firm and the profit and loss account. Exhibit 341 will be transmitted to the Circuit Court of Appeals, it being impractical to set the financial report forth in this Bill of Exceptions.

Q BY MR. REDWINE: Your testimony was that the partnership received no profits from the Italo Petroleum Corporation of America stock that was sold through the Egon Tropp or M. Taber account, Mr. Cavanaugh?

A Yes, sir, not as a partnership, we did not, or as individuals, we received no profit.

Q At the end of 1929, however, you figured the amount of money that you had received as the result of the sale of this stock as profits?

A That is just a matter of bookeeping, Mr. Redwine.

Q This statement was prepared as a premise for an income tax statement that was to be filed by the partnership?

A I presume so.

Q And as a matter of bookkeeping would you pay an income tax on something that you did not receive a profit from?

(Testimony of William J. Cavanaugh)

A Not necessarily.

Q Well, you would not do it?

A You would not pay an income tax on something that did not belong to you. It was understood at all times we had to make a final accounting to Mr. McKeon.

Q Mr. Cavanaugh, isn't it a fact that the person who pays the income tax is the person who makes a profit from the transaction?

A I suppose so.

Q This statement, Exhibit 341, was prepared for income tax purposes, wasn't it?

A I presume it was, Mr. Redwine, yes.

Q Then the partnership was making a report to the Government for income tax purposes, weren't they?

A I presume they were.

Q And that report for income tax purposes was a report upon which the income tax that you and Mr. Wilkes should pay?

A I presume it was, yes.

Q And you later did file an income tax return for the year 1929, didn't you?

A Naturally.

Q I show you a document and I will ask you if this is not the income tax that you returned for that year.

A Yes.

The document was received in evidence and marked Exhibit 342, and is in substance as follows:

1929 Income Tax Return of William J. Cavanaugh, verified June 14, 1930, reciting an income from the partnership of Alfred G. Wilkes and William J. Cavanaugh of $30,485.08, dividends from stock from partnership

(Testimony of William J. Cavanaugh)

$2,628.55, making a gross and net income of $33,113.63, upon which a total tax in the sum of $2,069.02 was due.

Q BY MR. REDWINE: Mr. Cavanaugh, isn't it a fact that this or a large portion of this $30,485.08 which you reported as income for the year 1929 for the partnership of Wilkes & Cavanaugh was derived as a result of the sale of that McKeon stock?

A No, I don't believe so.

Q Would you deny that?

A I do not know as I would. Theoretically, it may have come that way.

Q Theoretically it may have come from that?

A Yes.

Q By that answer you mean what, Mr. Cavanaugh?

A As a matter of bookkeeping.

Q Well, this is more than a matter of bookkeeping, is it not, Mr. Cavanaugh?

A I would not say so, no.

Q Why, you paid to the Government a tax on this $30,000, didn't you?

A Yes.

Q And yet your testimony is that you did not receive this $30,000, isn't that right?

A No, we could have been acting as agents for somebody else.

Q Well, were you acting as agents for anybody else?

A Yes.

Q And did you derive this $30,485.08 because of that agency?

A I don't know whether it was that exact amount or not.

(Testimony of William J. Cavanaugh)

Q Did that agency that you were acting for receive its profits because of the sale of the stock of John McKeon through Egon Tropp and M. Taber?

A Yes, sir.

Q Then you did receive a profit from the result of the sale of that stock as agents of John McKeon, is that right?

A We might have, yes.

Q Well, did you?

A Well, I can't tell those exact figures. It is a long time ago, and I was doing a lot of business. I don't recall that. I don't know very much about books myself.

With reference to Exhibit 341, financial report of A. G. Wilkes and William J. Cavanaugh, showing the following: "Partners—Capital—William J. Cavanaugh, as of January 1, 1929, one-third of 1929 profits, $33,113.63," my income tax return could take into consideration as profit the money received by the partnership as a result of the sale of John McKeon's stock, but we were acting as agents for Mr. McKeon in the sale of that stock.

With reference to Exhibit 341, under the caption "Income," where it states, "Dividends, Italo Petroleum Corporation of America, $4,868.15," I would not say that that represented dividends on stock that I held and which had been transferred to me from the McKeon stock. That could have been dividends from an interest I had in the syndicate. However, I won't say for sure; I don't know whether it was that much or not. We could have accounted for the receipts that were derived from the sale of all of John McKeon's stock through the Wilkes-

(Testimony of William J. Cavanaugh)

Cavanaugh partnership in our income tax return, as his agent.

Q If you had filed an income tax as his agents, you would have filed that tax in his name, would you not?

A I don't know; I don't know enough about it.

MR. ABRAHAMS: If the Court please, I object to this line of inquiry. It calls for a legal conclusion and it resolves itself into a legal argument as to the proper way in which to make an income tax return. Now counsel for the Government has stated that certain rules prevailed in the making of income tax returns—

THE COURT: I don't care to hear argument. Now, Mr. Abrahams, this cross-examination illustrates the value, in my judgment, of cross-examination. I will not comment on the character of the testimony of this witness, although I might properly do so; I don't care to. Nevertheless, the cross-examination of the Government is both pertinent and entirely proper.

MR. ABRAHAMS: It assumes a legal position, however, that is not tenable.

THE COURT: Well, wait a moment. An examination testing the good faith of his statements made here in the presence of all of us. The objection must be overruled.

MR. WOOD: Exception.

Q BY MR. REDWINE: If you had filed the income tax in your own name as his agent, John McKeon would have reimbursed you for the money that you paid out on account of that, would he not?

A No, because we were to have a final accounting in all of this.

(Testimony of William J. Cavanaugh)

Q You were going to have a final accounting?

A Yes, sir.

Q He never did reimburse you on account of the money that you paid out, did he?

A No.

Q Did you ever render any accounting to him because of the income tax that you had paid on this money?

A Mr. Wilkes rendered Mr. McKeon a final accounting.

Q Did you ever?

A No.

Q Do you know whether or not that final accounting that was filed by Mr. Wilkes for John McKeon included a statement of the amount of money that you had paid in the form of income taxes on your personal return?

A I don't know positively that it did, but I know we had a final accounting and everything was accounted for.

Q You don't know one way or the other then?

A I could not say for sure, no.

I had an interest in the syndicate which I received from E. Byron Siens. It was my interest originally but was transferred to the partnership, receiving in return therefor a one-third interest in the partnership. Certain assets were turned into the partnership by both Mr. Wilkes and myself, and my syndicate interest was one of those assets. That interest was not really Mr. Siens' interest in the syndicate, but was Mr. McKeon's interest, which was in Mr. Siens' name; it was really acquired from John McKeon. John McKeon agreed to carry me for that interest in the syndicate and I gave him my note for it. I do not know why John McKeon was carrying

an interest in the syndicate in the name of E. Byron Siens.

I received *alf* of the commission that R. E. Toomey received from Italo Petroleum Corporation of America, which amounted to $5000.00. The check for $5000 was made out to R. E. Toomey because it was due to him as far as the company was concerned. Mr. Toomey's testimony was not truthful when he testified Mr. Wilkes told him that half of the $5000 check was his and to make out a check to me for $2500. I put the $2500 in my own bank account. I don't know whether I gave anybody a receipt for that $2500.00 or not. I could not say definitely whether I rendered anybody a statement for that $2500.00. In our final adjustment with McKeon I included the half interest in the syndicate that I got from Siens.

REDIRECT EXAMINATION

With reference to Exhibit 341, I do not want it understood that I paid a total of $5,597.50 and became the owner of an indefinite number of shares of the Italo Petroleum capital stock that subsequently was sold for a total of $239,000. I did a lot of buying and selling of Italo stock on the Exchange independently of the McKeon stock.

With reference to Exhibit KKK, the item 483,450 shares of the common capital stock and 2070 shares of the preferred capital stock of the Italo Petroleum Corporation of America, I believe that that is the item referred to on Exhibit 341, wherein is listed the items of partnership assets, together with a profit indicated to be the

(Testimony of William J. Cavanaugh)

amount included here in my disbursements of the stock for the benefit of the McKeon Drilling Company or John McKeon. I did not purchase that stock for some $5000 and subsequently sell it for better than a quarter of a million dollars. 200,000 shares of that stock was sent down to secure a note, as I testified yesterday, for John McKeon.

Exhibit 341, referring to other stocks than the Italo stock, discloses the transactions of profit or loss with respect to such stocks.

I believe Mr. McKeon had three subscriptions to the big syndicate. He carried one in his own name for $100,000, another in the name of E. Byron Siens for $100,000, and another in the name of Delaney for $100,000. It was in the interest of the E. Byron Siens' subscription that I received a $50,000 interest. I believe that this income tax return was also prepared by Mrs. Lyle, and I signed it believing it to be correct.

RECROSS EXAMINATION

(By Mr. Redwine:) Q You swore to this income tax as correct, did you not?

A Yes.

Q Now, referring to that item of $5000 as the cost of stock, you did not pay John McKeon anything for the stock that you received from him, did you?

A I did not receive any from him.

Q Well, that the partnership received from him, then?

A No.

Q It was sold through the partnership and that item of two hundred and thirty some odd thousand dollars

(Testimony of William J. Cavanaugh)

includes a profit that was made from the sale of that stock, doesn't it?

A Well, that is what the stock was sold for. I would not call it a profit, no.

Q You did not pay anything for the stock, did you?

A It was not our stock.

Q Well, you did not pay anything for the stock that you accounted in there as having received a profit from, did you?

A No.

Q Now, just one other thing. This probably should have been taken up on cross examination before, your Honor, and I omitted to do it. The evidence in this case shows that there was certain stock that was placed in the Frederic Vincent escrow up at San Francisco, that it was McKeon stock that was placed in that escrow. The evidence shows that as a result of this McKeon stock being placed in that escrow, some $100,000 was received in the escrow which was a part of the money that was received as a result of the sale of that stock. Now, the evidence further shows that this $100,000 was split in four ways, Siens, 25,000, Wilkes, 25,000, McKeon Drilling Company, Incorporated, 25,000, and Shingle, Brown & Company, 25,000, and some odd cents. Now, I show you a portion of Exhibit 231, and I will ask you if that endorsement on the back of that check is not your endorsement.

A It is.

Q And the endorsement over to you is the endorsement of Alfred G. Wilkes?

A It is.

(Testimony of Edgar P. Lyons)

Q Isn't it further a fact that this $25,122.25 was considered as a profit of the partnership?

A I don't believe it was.

Q If I could have Exhibit 342 for just a moment, please.

A It may have been.

Q I call your attention to this item appearing on page 3 under "Income of the partnership, 25 per cent profit, Vincent syndicate through Shingle, Brown & Company, $25,122.25." I will ask you again if it is not a fact that this $25,000.00 was considered as a profit of the partnership?

A It looks like it was.

Q And what did the partnership give for this $25,000?

A I can't recall that, Mr. Redwine. There were so many transactions handled.

EDGAR P. LYONS,

a witness on behalf of defendants McKeon, and being duly sworn, testified as follows:

I have been an accountant for ten or twelve years and was originally one of the defendants in this action, and was dismissed on motion of the Government at the end of its case. Prior to the year 1928 I was called upon at different times to perform services for the McKeon Drilling Company. After the fall of 1928 I was employed by the McKeon Drilling Company about once every two years. I remember being called by the McKeon Drilling Company in the fall of 1928 to perform some accounting services for that company. That was about November 3, 1928. I was engaged by Mr. Thacka-

berry, secretary of the corporation. Mr. Thackaberry at that time was in general charge of the accounting and bookkeeping of the company. I was in court when certain entries in the journal of the McKeon Drilling Company were introduced in evidence, together with certain work sheets prepared by me. Those entries and certain other entries were made following November 3, 1928, as of October 16, 1928. I believe that the McKeon-Italo deal was completed at midnight October 15, 1928, and those entries were made to relate back to that time.

When Mr. Thackaberry called upon me to perform this accounting work he told me that this deal had been made whereby the McKeon Drilling Company were selling their properties to the Italo, and informed me that the Italo were to assume some $500,000 of their liabilities as of October 15th, and asked me to determine those liabilities as of that date and to get up any other relevant data from their books in which the Italo might be interested. I proceeded to do this. In a general way this work included the verification of the liabilities and a detail of their liabilities, which were to be transferred, the preparation of journal entries to correct the McKeon books with respect to those liabilities, going over their asset accounts or detailed well accounts and obtaining amounts of equipment of various kinds which had not yet been depreciated and charged off, and in computing the depreciation on those assets up to October 15th.

We made certain adjustments for the year up to October 15th. Exhibit 87-A are the original work sheets

(Testimony of Edgar P. Lyons)

on which I compiled this information. I compiled certain information in regard to the cost price of the different properties that were being transferred. I thought that would be interesting and valuable information to go to the Italo Company, and I considered as an accountant that was part of the general directions that I had been given to compile such information as I thought ought to be transmitted to the purchasing company.

In general Mr. Thac*k*berry directed me to do the work that I did. I obtained all of my directions and information from him.

Book values of properties primarily represent the cost value upon which they go upon the books of the concern. If a bank should buy a piece of farm land for $5000 and pay for it, the $5000 would be the book value of the property, without regard to whether the bargain was a good one or a bad one, if the company was capitalized at $5000. If it went upon their books as one of its capital assets, that would be the book value. If the bank loaned $2000 to the farmer and took a mortgage upon the farm and it wasn't paid and the bank foreclosed and incurred the expenses of foreclosure, then the book value of the farm would be $2000 plus the expenses that had been incurred, if the bank capitalized the expenses in connection with the loan. That is considered good accounting. The expense of foreclosure could be charged up as business expense or as a capital item. If, upon that same farm, an oil well was developed, producing 10,000 barrels of oil a day, the book value would still be the original cost until they saw fit to appraise or appreciate it and set it up on the books at a larger amount.

(Testimony of Edgar P. Lyons)

About the time I completed my work which is embodied in Exhibit 87-A, I had a talk with Mr. Thackaberry about further accounting work to be done. Thackaberry asked me to do some further work in connection with advising him as to how the whole transaction should be set up on the books. That is the Italo transaction, the sale of the assets to the Italo, with respect to the method they would return their income, compute their income tax later on in the year when it would be necessary. Mr. Thackaberry told me that the total consideration to be received by the McKeon Drilling Company, according to this contract, was $500,000 in cash, $500,000 in notes, and $500,000 in liabilities to be assumed, and 4,500,000 shares of stock, of which he stated to me only 2,000,000 shares were to be included in the income of the McKeon Drilling Company, and that in making this tax computation I was to make it on the basis of 2,000,000 shares only. He did not tell me why only 2,000,000 shares was to be included in the income tax statement. I got all of my information in regard to the work that I was to do from Mr. Thackaberry. I do not remember any one of the McKeons talking to me about it.

With the information of Mr. Thackaberry in mind, I proceeded to prepare the necessary book set-up to accomplish the situation. I worked on a hypothetical case; their taxable year had not yet finished, and we were making the hypothetical computation, which presumably he could use if he cared to in setting up his profit on the deal.

The first two sheets of Exhibit 89 are the result of my computation of the market value of the stock. The remaining sheets are the journal entries made by me,

(Testimony of Edgar P. Lyons)

memorandum prepared in connection with this first computation. I set about in the latter part of my work endeavoring to arrive at an equitable statement of the value of this consideration which the McKeon Drilling Company was receiving, in order that it might be used in connection with determining the profit for taxable purposes. I understood that the figures were to be used in connection with the preparing of their income tax return later, that is, at the end of the year. As part of that computation I arrived at what I considered the value of the consideration that had been received by the McKeons upon the basis of the information that had been given to me.

The net result of the computation made by me in an endeavor to find out the taxable profits which the McKeon Company would be liable for on account of that deal is set out on Exhibit 86-B at page 640, and is a computation whereby the fair market value of the Italo stock, 2,000,000 shares, which is referred to in the journal entry, was determined as $623,829.93, and the total consideration was determined as $2,123,829.93.

In arriving at the results for taxation purposes, I considered a number of different elements. As a matter of accounting for tax purposes, all money that comes to a man or to a corporation is not taxable income. I was endeavoring to arrive at an equitable adjustment of the transaction for income tax purposes upon the basis of the information that Mr. Thackaberry had given me.

I have copies of the journal entries which I prepared but did not enter on the books. Page 621 is a sum-

marization of what I wrote out and embodied in my work sheets.

In connection with the work I was doing, the contents of the contract under which the McKeon Company was selling its properties to the Italo was disclosed to me by Mr. Thackaberry in a general way. I do not remember whether I actually examined the contract itself. Subsequent to that date I examined the contract very carefully.

With reference to the summarization that I wrote, wherein the following appears: "The contract further provides for the payment of ten notes of $50,000 each, maturing monthly, starting November 15, 1928." I do not know whether that is a correct recital of the dates of the notes provided for in the contract or not.

With reference to the entry, "For the payment of Italo stock to the extent of 4,500,000 shares, 50 per cent common and 50 per cent preferred," I would have to examine the contract to ascertain whether or not that is inaccurate in that the stock actually received was 3,500,000 shares of common and only 1,000,000 shares of preferred. That information must have been communicated to me by Mr. Thackaberry.

I also received the information from Mr. Thackaberry that appears in that statement, "Of which some 2,500,000 shares are payable as commissions, leaving 2,000,000 shares as additional consideration due McKeon Drilling Company," from Mr. Thackaberry.

I do not remember exactly whether I arrived at the statement as to commissions from what Mr. Thackaberry told me or from my own conclusion as to the effect of the transaction that was detailed to me by him, but I

(Testimony of Edgar P. Lyons)

think Mr. Thackaberry referred to it as commissions. I know that the contract does not provide for any commission.

With reference to the following language contained in the summarization, "However, as the financial status of Italo is uncertain and as it is not definitely known that the full consideration will be paid (in which event the properties revert back to the company), and as the market value of the stock is a fictitious value based upon local supply and demand and is not a criterion of the real value of the stock, which value could not possibly stand the strain of absorbing the block of stock which is payable under the contract," in talking the matter over with Mr. Thackaberry we were of the opinion that the market value of the stock was not a criterion as to what the McKeon Drilling Company could, under the circumstances, get for the large block of stock which they had on hand to dispose of.

That reference to the full consideration will not be paid was talked over between Mr. Thackaberry and me. I understood that to be a fact at that time. It was also considered by Mr. Thackaberry and me that the stock involved was escrowed and placed beyond the authority or ability of the McKeons to obtain it at that time. Thackaberry told me they didn't have the stock, and I remember him saying it was in escrow.

With reference to the statement, "and is not a criterion of the real value of the stock, which value could not possibly stand the strain of absorbing the block of stock which is payable under the contract," I meant that we couldn't conceive that the market value which was based

on a few shares going over the curb exchanges in San Francisco and Los Angeles would be a criterion as to the value of 2,000,000 shares of stock if they attempted to sell it. We thought such a large block of stock would break the market.

I was not informed as to why the 2,500,000 shares of stock was not at that time retained or what was to be done with it.

With reference to the commissions referred to in the statement, to the best of my recollection Mr. Thackaberry referred to it in that way, and we were only concerned at that time with making this computation for the tax. I had in mind the fact that only 2,000,000 shares of the stock was to be retained and that 2,500,000 shares was to be devoted to some other purpose. I remember informing Mr. Thackaberry at the time that it would be necessary for him after the end of the year to file form 1099 with the Treasury Department, which is the information return. I knew that that summarization could be used for the purpose of making entries on the books of the company unless they changed their mind before the end of the year or before they filed their income tax return.

At the time I wrote this entry, "It is the belief of the management of this company that only such profits as result from the excess of cash received over cost should be taken into profit and loss," I wrote that before I later made the tax computation, and at that time Mr. Thackaberry intended to return only such income as was represented by the cash, and that latter part of the journal entry so stated.

(Testimony of Edgar P. Lyons)

During my work in connection with the making of this entry on the basis of the information that I had, I did so in what I considered a proper and reasonable manner for the purpose of making up and compiling information to be used for tax purposes.

With reference to the entry on page 641, as follows, "Fair market value of Italo stock, $623,829.93," that was one of the things that I was endeavoring to arrive at, that is, the value of the stock received in connection with other things, for the purpose of determining the extent of taxable gain.

The general practice of accountants in compiling information as a basis for income tax returns and in computing taxable income is to use a conservative value.

CROSS EXAMINATION

(By Mr. Redwine) When working on the books of the McKeon Drilling Company I was attempting to record the transactions between the McKeon Drilling Company and the Italo Petroleum Corporation of America from the information which was given to me by Mr. Thackaberry. I was informed that the contract between the Italo and McKeon Companies provided for the payment of 4,500,000 shares of the capital stock of the Italo Petroleum Corporation of America as a part of the consideration to be paid for the assets of the McKeon Drilling Company. I was informed at that time *the* the McKeon Drilling Company had not received any of that stock. Mr. Thackaberry informed me that they were to receive, according to the contract, 4,500,000 shares, and that 2,000,000 shares of that was to be retained by the

company as income. I was advised that the company was to receive and turn over that property for the total number of shares called for by the contract, that is, I was advised that even though the contract provided for 4,500,000 shares of stock, that the company was only to receive 2,000,000 shares of that 4,500,000 shares of stock, and I was attempting to record the value of those 2,000,000 shares of stock. I did not think that the market price of the stock was the proper basis upon which to figure its value, one of the reasons being that the market could not have absorbed such a large amount of stock. In my opinion, if the stock had been placed on the market the price would have gone down, and I attempted to ascertain the fair value of this stock on some basis other than the market price. In doing this I used as a basis of ascertaining the value of the 2,000,000 shares of stock the fair value of the property transferred by the McKeon Drilling Company to the Italo for the stock and the cash consideration. It is not correct that I ascertained the fair value of the McKeon Drilling Company property to be $2,123,829.93. What I was ascertaining was the fair value of the consideration of the stock plus the cash and the notes and the liabilities to be assumed, rather than the fair market value of the properties. In order to reach a basis for figuring the fair value of the stock I did not use the fair market value of the property. Had we wanted to obtain the fair market value we would have gone about it in a different manner. What we were attempting to do was to arrive at the fair market value of the consideration. In arriving at the fair market value of the stock we did arrive at a conservative value of the properties

(Testimony of Edgar P. Lyons)

by the use of an appraisal of those wells that were actually on production, and in addition by using the depreciated cost values of partially drilled wells and equipment. But in using this cost value or this depreciated cost value of partially drilled wells, it cannot be stated that that would be a correct method of arriving at the fair market value of those assets. In arriving at the fair market value of the consideration I did not arrive at the fair market value of that which the McKeon Drilling Company had given for the consideration. In arriving at the fair market value of the stock we did arrive at a conservative value of the properties by the use of an appraisal of those wells that were actually on production, and in addition by using the depreciated cost values of the partially drilled wells and equipment. But in using this cost value or the depreciated cost value of partially drilled wells, it cannot be stated that that would be a correct method of arriving at the fair market value of those assets.

In making those entries on the books I was attempting to arrive at what I thought was the fair market value of the stock. It is true that we took into consideration the values of the properties on two different bases, but I cannot subscribe to the fact that that would be the correct means of arriving at the fair market value of those properties.

As a result of my figuring I placed a value of $623,-829.93 on the 2,000,000 shares of stock that was received, and a valuation of $1,500,000 on the cash, notes and assumed liabilities, and a valuation on that which had been received by the McKeon Drilling Company for its assets as $2,123,829.93.

(Testimony of R. S. McKeon)

REDIRECT EXAMINATION

In the operation that I went through I did not attempt to make any appraisal or valuation of the property at all of the McKeon Company upon my own judgment. It is a fact that so far as the appraisement of the producing properties is concerned, that is, the producing wells that I took appraisement thereof made by somebody as a basis of value of one kind of property, that I took the book value depreciated of the properties that were not actually producing and put the two together to arrive at the value for the purpose that I had in mind. The appraisement was for actual producing wells. Then I took the depreciated book value of the other properties and the wells in course of construction and so on, and added the two together to use as a factor in arriving at a determination of the value of the stock that had been received.

R. S. McKEON,

called as a witness on his own behalf, testified under oath as follows:

I have lived in Los Angeles County since 1920, and am a brother of John and Raleigh McKeon, defendants in this action. I have known Mr. Wilkes, the defendant, almost all my life. We were born and raised in the same town. I went to work for him about 20 years ago. John McKeon has also been acquainted with Mr. Wilkes for a number of years.

I first met John Perata and Paul Masoni July 6, 1928, at a directors' meeting of the Italo Petroleum Corporation of America in San Francisco. I had not been acquainted with them in any way prior to that time. I first

(Testimony of R. S. McKeon)

met Fred Shingle in the fall of 1928, and Horace Brown during the summer of 1928. I had never had any business transactions with them prior to that time, nor had I with Mr. Masoni or Mr. Perata; and I met Westbrook in 1923, Siens about 1922 or 1923, Cavanaugh a number of years ago.

When I first came to the oil fields I worked in and around Taft, and from the time I came to California I have been closely connected with the oil business in one phase or another continuously. I first went to work for an oil company that was owned by Mr. Wilkes and his associates, called the Amalgamated Oil Company, and then worked for some of the Doheny companies, and then for the W. B. Head Drilling Company. I have worked at practically every line of work in the oil fields from driving a team up to production superintendent.

In connection with my work in the oil business I attempted to learn all that I could about the business and gave it my close attention and thought for a good many years. I have been connected with the actual drilling of in excess of a thousand wells in California alone.

The Head Drilling Company was a contracting company whose business was the drilling of oil wells by contract, and it was owned by A. G. Wilkes and W. B. Head. I worked for the Head Drilling Company drilling wells in Wyoming during the years 1917, '18, '19, and part of 1920. I came to California in the spring of 1920 and went to work for my brother John McKeon, who was contracting wells here in the State, and I worked for him until 1923. In 1923 John McKeon incorporated his business. He had been operating under the name of McKeon

(Testimony of R. S. McKeon)

Drilling Company, of which he was the sole owner, but it was not a corporation. He incorporated in 1923 the McKeon Drilling Company, Incorporated, and he divided the stock therein as follows: 30 per cent to Raleigh McKeon, 30 per cent to John McKeon, 30 per cent to myself, and 10 per cent to my brother Paul McKeon. We had been working together all of our lives, and John decided it would be a fair thing to incorporate the business that up to that time he had owned, and allow us all to share in it with him. He gave us our interest in the company. Raleigh and I put in some little odds and ends of assets in the company, but the bulk of the assets came from Jack. It had been his business up to them.

The assets that we received in the company, that is, our interest in the company, was not proportionate to the amount of assets we put in.

We then continued doing contracting business and gradually got into the production of oil for ourselves. We gradually acquired leases of various oil fields around the Los Angeles Basin and developed oil wells on them, and from year to year our production increased, and we were working up a good business. We made a lot of money every year, out of the production of oil, and drilled many wells in Signal Hill, Torrance, Athens-on-the-Hill, Santa Fe Springs, Huntington Beach, in fact all of the fields in the Los Angeles Basin.

In 1926 we organized another oil company known as the McKeon Oil Company, in which the Richfield Oil Company and ourselves each had a half interest. We developed a number of wells for the McKeon Oil Company and in 1926 we sold our interest in that company to the

(Testimony of R. S. McKeon)

Richfield Oil Company and my brother John went over to take charge of the Richfield Oil Company production department, my brother Paul went with him to take charge of the actual field operations for the Richfield, and Raleigh and I stayed and operated the McKeon Drilling Company. At that time we sold everything the McKeon Drilling Company had with the exception of one oil well we had on Signal Hill, known as the Crown City Oil Well. That was the sole property that the McKeon Drilling Company had at that time. Raleigh and I immediately went to work developing other new oil properties. We drilled a deep well on Ventura Avenue for Mr. Magenheimer, and about that time Jack brought in a deep well on Signal Hill for the Richfield Company and made the discovery of the deeper sands there.

We immediately started acquiring leases there and developing them. We drilled our Evans well, which came in in February, 1928, around 2500 barrels; next the Ellis well, which came in around 1500 or 1600 barrels; next the Macrate well, that came in for around 2500 barrels, and we had acquired a number of properties in the field at that time and started the drilling of other wells.

By early 1928 we were well back into the oil production business. We were drilling those wells and had assembled a very complete drilling outfit. We had six or eight or nine strings of tools there, with complete drilling rigs. We had a complement of trucks and car and things of that sort for carrying on the business, a machine shop, a well equipped camp site, and garages and things for taking care of our business, and a really well developed

(Testimony of R. S. McKeon)

and rounded out oil business in 1928, and a nice large production of oil.

Our properties were all located in Signal Hill. This is a map of the Signal Hill oil field. The properties appearing thereon colored in red are those that the McKeon Drilling Company owned and turned over to the Italo Petroleum Corporation of America in 1928; those colored in green are the Graham-Loftus properties that were turned over to the Italo Company, and those colored in yellow are those turned into the Italo Company by other companies in 1928. I have also written on here in red the production in barrels per day for the various wells around the hill. I have written in black lead pencil the depth of certain wells that were drilling on the day I made my deal with Italo, July 5, 1928.

Signal Hill field is about two and a half miles long and a half mile wide. I am familiar with the entire Signal Hill Oil field. We started the third well that was drilled on Signal Hill and have been drilling wells continuously. We have been identified with Signal Hill ever since the discovery of oil was made there. We have drilled about a hundred wells in the Signal Hill territory. I have kept in close touch with other wells drilled in the field by other operators. It is the custom among most operators in the field to exchange information concerning the wells that they are drilling. We trained a corps of scouts, and they met once or twice a week or oftener and exchanged information as to producing or drilling wells, so that the information was general among operators.

In connection with my experience in the oil production business I became familiar with the established geological

(Testimony of R. S. McKeon)

guides that were used by various geologists and petroleum engineers in the location and estimation of oil production. In the acquiring of these properties from 1926 to 1928 I exercised my judgment and best knowledge and information upon the question as to whether they were valuable properties, and also used information that had been obtained from others, and such geological knowledge as I had.

We acquired these properties for the purpose of developing them as oil properties, with the intention that we would develop them with our own money, and we did. We had no other money except our own money to drill our wells, and we raised no money except from our own pockets. As we acquired these properties, I believed that they were the best that could be obtained on Signal Hill, and we made oil wells out of nearly every well we drilled.

The map was received in evidence and marked Exhibit LLL.

The witness thereupon explained said map to the jury as follows:

This is what is known as the Seaton community lease of approximately five acres on the extreme eastern end of the field. My first transaction with the Italo was to sell them a half interest in this lease for $125,000. The McKeon Drilling Company was to complete a well on that property, and they were to have a half interest in the well and in the five acres of ground there, for the sum of $125,000. The well was a failure and we never got any oil out of the property at all. No oil has ever been pro-

(Testimony of R. S. McKeon)

duced off of that property since that time. This next property is what is known as our Conklin lease. We drilled a well there which afterwards went into the Italo Company, and it has been a small producer. It was not a big well. The next is the Macrate well. We had our first well on that. It was a good well at the time I made my deal with the Italo, producing 934 barrels per day. Our second well was drilling at that time at a depth of 700 feet. There are some adjoining wells there owned by the Rio Grande Company, of which well No. 10 was producing 5500 barrels a day in July when we sold the property to the Italo. And here is the Shell well which was producing 3000 barrels per day when we made our deal with the Italo. The next property is the Crown City property, which John McKeon acquired in 1923 and drilled a well on it, which he afterwards turned into the McKeon Drilling Company, and up to the time it was turned in to the Italo Company it had produced in excess of 1,500,000 barrels of oil, and we had a new well that we had drilled on this property which we had completed just a few days before it went in. It was producing 250 barrels per day. The Shell Company had a well here at Alamitos which was producing 3000 barrels a day. The Richfield Company was producing 1100 barrels per day. The Petroleum No. 5 was producing 7500 barrels a day. This next property is the Camp property, where we had the camp site, machine shop, garage, office buildings and yards. The next is the Ellis property on which we had one well producing 760 barrels per day, and another one drilling at 6475 feet. The next is the Evans property, which had a well producing 2270 barrels per day. The

(Testimony of R. S. McKeon)

next is our Thorne property. We were drilling at 6424 feet. We owned this lot in fee and were not drilling a well on it at the time. This is a property known as the Knight property, and we were drilling there at 5383 feet. Those are the properties that the McKeon Drilling Company put into the deal. They were well scattered all over the field, and we thought very well took in all parts of the field.

I considered this Deeds property one of our best locations. It is located near the cemetery and the Lovelady Pool, where the largest production had been obtained in Signal Hill, and since no wells could be drilled in the cemetery, around which there was big production, I considered it a very valuable property.

The green properties on the map are those that came in from the Graham-Loftus Company, the yellow properties are the Wiley-Tobin lease, the Modoc property. Here is the refinery sites that the Italo-American had owned, and the refinery site that came in from the Brownmoor Oil Company. This is the Pelham property, which had two wells, one drilling at 6304 feet and one at 7225 feet. We had this other property known as the Fairchild. We got a well on that. The Graham-Loftus property had a well drilling at 4537 feet, and one at 3703 feet when we closed the deal up.

There are twelve properties marked in red on the map which the McKeon Drilling Company turned into the Italo Petroleum Company. The McKeon Drilling Company at the time the deal was made with the Italo had five producing wells and eight in the course of drilling. The drilling wells were at various depths, some of them

being close to completion. When the deal was made July 5, 1928, I thought that all of those wells would be finished within a period of sixty to ninety days. The Deeds well came in a good well but not nearly so good as I expected.

The Crown City Well was 7000 feet deep and went off 1600 feet to one side.

At the time the deal was made with the Italo Petroleum Corporation these five wells of the McKeon Drilling Company were producing a little over 4300 barrels of oil per day. The drilling wells when completed did not add any material amount to that production after the Italo acquired them, because the production on some of the producing wells decreased. The Knight well came in for somewhere around 2000 barrels a day after the sale to the Italo.

During the year 1928, up to the time we turned our properties in to the Italo Company on October 15, 1928, we realized in excess of $900,000 from our wells. I think that was the largest income from oil that the McKeon Drilling Company had in any year up to that time. The producing and drilling wells were well equipped with full facilities for handling the oil, such as tanks, derricks, boiler plants, tubing and everything that is necessary for a completed well. The drilling wells were equipped with everything with the possible exception of the gas traps and production tanks and whatever would be finally put on at the completion of the wells.

I first acquired information or knowledge concerning Italo Petroleum Corporation of America in the spring of 1928. Mr. Wilkes called on me one day and said that he had reentered the oil business and was employed by

(Testimony of R. S. McKeon)

the Italo American Company to see what he could do with the company. He said that the company had been started by a group of San Francisco Italians who knew nothing of the oil business, but that they had in his opinion some good assets on the Hill and that they had employed him to put the company on its feet and do whatever was necessary to rehabilitate it; that he was going to reorganize a new company to handle some properties and raise some additional money, and that he would like to have a few practical oil men on the board with him, and asked me if I would serve as a director on the board. I said I would. That was my first introduction and knowledge of the Italo-American or the Italo Petroleum Corporation.

That conversation with Mr. Wilkes was in February or March, 1928. At that time Wilkes told me that about all the Italo-American had was a ten-acre lease known as the Wiley-Tobin lease, with which I was familiar, because a number of years before we had started to drill a well on that property, which we never completed because the property was sold by the land owners to some one else. I knew the property and where it was, and Wilkes told me he had entered into an agreement with the Continental Oil Company to drill some deep wells on that property on a fifty-fifty basis. He said they had a refinery and dehydrating plant and had the Hill pretty well covered with pipe lines, and that was the first information I had concerning the company. That information was with reference to the Italo Petroleum Corporation. He said it was the new company that he was going to organize to take over the assets of the older company, because they didn't like the set-up of the old company or something, and he

said that I was going to become a director of the new company, that is, the Italo Petroleum Corporation of America. He asked my advice regarding the Wiley-Tobin lease and I told him that in my opinion the chances of deep sand production there were extremely good. He said the Italo Company had entered into the distribution of gasoline and motor oils and had made a contract, I believe with the California Petroleum Corporation, for the refining of gasoline and oil, and had opened service stations in various parts of California, Northern California, and he told me about their increased sales from month to month and thought that would be a very profitable branch of the business, distributing gasoline at first and possibly some time at a future date refining it themselves to have a market established for their products. That was the first talk I had had with Mr. Wilkes in a matter of two or three years. He also said that Fred Gordon was going to resign as Vice-President of the California Petroleum Corporation and come in with him in the new company, and that some of the old San Francisco men from the old company would also be on the board. Mr. Gordon was the only one that I knew, he having been identified with the oil business in rather a big way ever since I had been in the oil fields.

The first time that I ever acted as or attended a directors' meeting was July 6, 1928.

In this first talk that I had with Mr. Wilkes, nothing whatsoever was said about buying the McKeon Drilling Company properties. This talk was just a visit in which he outlined his plans for the new company, said that he

hoped to make a considerable company of it, and that he believed he could get ample financial backing in San Francisco to do it.

Referring to the Seaton community lease, that transaction was handled before any negotiations between the Italo Corporation and ourselves for the purchase of the McKeon properties. Along in May, 1928, Wilkes told me about a half million dollars worth of stock in the new company had been offered to the old stockholders, that it had been taken up in a matter of three or four days and that the money just rolled into the office. He said that they had or were about to purchase the Brownmoor Oil Company, which had various assets in the Basin, and a section of land in the Kern River Front field, that he was looking around for some properties to buy in Signal Hill, for the purpose of developing them, and wanted to know if I knew of anything that was available, and I told him about the Community lease. We were drilling a number of wells then and carrying quite a development load, so I showed him this particular lease and the wells that were drilled around it, and those on production around it, and I offered to sell him a half interest in the lease for $125,000, with the understanding that I would complete the well and finish everything necessary thereto, and we would each own a half interest in the well and in the acreage, but any subsequent wells we would drill together, each of us paying fifty per cent of the cost until the McKeon Drilling Company and the Italo Company became equal partners on the lease and well. The McKeon Drilling Company's one-half interest in the Seaton lease was one of the assets sold to the Italo in the final con-

tract, and the Italo thereupon became the owner of the whole lease.

Our first deal was that Italo was to furnish $125,000 in cash and we were to drill the well on the lease. We had to drill the well whether it cost us twice that much or half of that much or whatever it was. We sold them a half interest in the property and were to complete the well for $125,000. By the time they finally made delivery of the properties, wells around that vicinity had reached depths where we were expecting production and there was no production, so it became advisable, in my opinion, not to complete the well. In the final transfer of the half interest, the burden of any completion of the well was on the Italo, so I told them that in my opinion the well should be abandoned, and that inasmuch as I had sold the property in the first instance to the Italo I wished they would appoint geologists or somebody to make a survey and find out whether I was correct. They did appoint a geologist named Philbrook, who was appointed by the executive committee of the company, and he surveyed the property and recommended that it be abandoned and quitclaimed back to the owners and no further money spent on it. So I told the Italo Company that if they wanted to do that I would sell enough of the McKeon Drilling Company stock to reimburse the Italo for the $125,000 they had spent and wind up the deal. We quitclaimed the property back to the Italo and the Italo got such personal property as was on there, boilers and those things, and we closed the deal up that way. The McKeon Company had expended around $60,000 in drilling the well on that lease. Whatever we had spent on the well

(Testimony of R. S. McKeon)

represented a loss to us. The net result of the transaction was the restoration to the Italo Company of the consideration that they had paid, the relinquishing of the property to the original owners, and we stood the loss of what the well had cost us. That is the transaction referred to in the minutes, in which I was thanked by the board of directors' executive committee, for my generosity in regard thereto.

I had nothing whatsoever to do with the Brownmoor deal. I knew nothing about it. At that time I had been elected a director of the company but was inactive and had never attended a meeting or qualified as a director. The first activity I had as a director was July 6, 1928.

I know nothing whatsoever about the Brownmoor deal or its negotiation, and only learned what it was after I became manager of the company, at which time I learned the consideration paid by Italo for the Brownmoor properties.

If there was any escrowing of stock or syndicating of stock in regard to the Brownmoor transaction, I knew nothing whatsoever about it at the time I became connected with the Italo Company. I knew nothing whatsoever about the Italo-American Petroleum Company or its being taken over by the Italo Petroleum Corporation, except what Mr. Wilkes told me as I have heretofore testified. I had nothing whatsoever to do in the organizing of either of those companies. I knew nothing whatsoever of any agreement between anyone concerning the Brownmoor transaction or the taking over of the Italo-American

properties by which anybody was to be defrauded or cheated, or anything about them that was unfair.

Shortly after we had sold our half interest in the Seaton Community lease to the Italo Company, my brother John McKeon called me on the phone and said that Mr. Wilkes and Mr. Vincent had been in to see him and had asked him whether or not the McKeon Drilling Company would be willing to merge its properties with a group of other properties that they had in mind to buy, and that he had told Wilkes to come over and see me about it.

That same day Wilkes came in and showed me a list of properties that he had been dealing on to purchase for the new company, which included most of the properties that afterwards went into the merger. There were some properties on the list that did not go in, and the Graham-Loftus property was not included at that time. We talked nearly all afternoon about the advisability of our joining the merger. I, myself, did not feel so very keen about it. I felt that we had a very nice company; my brothers and I owned it all; we had no other stockholders and had no dissatisfaction. We worked entirely in harmony and had an income of around a hundred thousand dollars a month. We had a number of what we considered good properties, with wells in various stages of drilling. We had a complete drilling unit, we had crews of, I believe, the best oil field workers in the country, men that worked for us for ten to fifteen years, and I liked the business that we had. We were not interested in the refining of oil or the distribution of gasoline. That end of the business did not appeal to me at all, as I considered the sale of crude oil a nicer business. It was

(Testimony of R. S. McKeon)

no trouble to sell all the oil you could produce. There was no worry about getting your money; the day it was due it was on your desk. But I told Wilkes that I would talk to Raleigh and Jack about it. My brother Paul had a ten per cent interest in the company, but he had always confined his activity mainly to the actual drilling of the wells and we did many things without even consulting him about it. Raleigh, Jack and myself met with Wilkes that night at the Biltmore Hotel. That was the latter part of May, 1928.

In that conversation there was very little said about any consideration to be paid for our properties, but the principal topic was discussing the advisability of us entering a merger of this kind, with our properties and ourselves going into the company, or whether we should remain out and be independent as we were. We had a a long discussion about the matter, and after we left Wilkes' room Raleigh, Jack and myself discussed the proposal in the lobby of the Biltmore Hotel. They finally agreed that I was to negotiate further with Wilkes, to make a thorough investigation of all the properties that were proposed to go in, and if I made up my mind that it was worth while, why, we would consider the matter further.

In our discussion with Wilkes and also at my meeting with Wilkes previous thereto we spent considerable time discussing the properties that the Italo Company was proposing to buy. We examined scout service reports on the various properties and I thought they were good properties. I was familiar with those located in Signal

Hill and more or less familiar with those in the San Joquin Valley.

The day following the conference with Wilkes at the Biltmore Hotel he came to my office to discuss the merger question, but was indefinite as to the kind of set-up it would be. He said he had various plans for financing the company and was going to San Francisco that night and on his return he would come back with a definite outline of the plan, and no agreement was reached at that time as to whether we would go in or stay out. I told him if he would come back with a definite outline of the plan I would by that time be able to tell him whether we would or would not be interested in joining with him in the merger or organization of this company.

He returned several days later with a list of the properties, and stated that the plan would be this: a syndicate would underwrite ten million shares of stock, would purchase the properties and turn them over to the Italo Company for ten million shares of stock. I said all right, because I had become more interested in the deal as the days had gone by. I had my own organization make detailed reports of all the wells that were being brought in, and I had gotten quite a lot of additional information about the condition of the properties and the prospects of it, and become pretty interested in them. I agreed with him on his return that if we could work out a satisfactory deal I believed we would go into the merger.

We discussed the proposition and I asked him a million and a half dollars in cash and a stock interest in the company. He again went to San Francisco and returned

(Testimony of R. S. McKeon)

and made a counter proposition, and instead of the million and a half in cash (I had told him at that time that our liabilities at that time were somewhere in the neighborhood of half a million dollars, and I wanted half a million dollars to pay the liabilities with so I could turn the properties over free and clear of indebtedness) I told him I wanted a million in cash as a cash consideration on the deal, and that whatever stock interest I would get would be a consideration too, but the million and a half in cash was the first consideration to start off the trading on. On his return he said that they could raise and pay me the million and a half in cash, but that as a counter proposition he said, "Why not let the Italo assume your liabilities? It is going to cost a lot of money to raise the finances, and they can take that over. Their credit is and will be good. They can pay those liabilities off in the regular course of business and we won't be put to the expense of underwriting that additional half million. I don't know what you fellows would do with a million dollars if I gave it to you, you would probably go out and drill a lot of new wildcat wells somewhere." I told him that is probably what we would do with it. Then he said, "Let the company give you notes for a half a million and give you a half a million in cash. That is enough money at once. You won't need a million." So I agreed that if we went in, those germs would be satisfactory, although I really preferred to get a half a million to pay my debts with at once. And we agreed on a million and a half that way and on three and a half million shares of stock in the company.

(Testimony of R. S. McKeon)

When I agreed on the 3,500,000 shares of stock, it was my understanding that the company was to issue 10,000,000 shares of stock, and that the only indebtedness the company would have would be a $500,000 that they owed to me, that is, to the McKeon Drilling Company, plus the one-half million dollars of assumed indebtedness and the half million dollars which the McKeon Company was to receive, it was my understanding that all of the other properties would be paid for at the time they were received.

In connection with the negotiations I consulted with Maurice Myers, of Spalding & Myers, they having been our attorneys for some time. Wilkes and I met with Myers and told him what the deal was to be and he said that he could not represent both parties in the deal, and suggested that one of us get another attorney to represent us. I asked my brother Jack to recommend some attorney and he recommended Rohe & Freston, the attorneys for the Richfield Company. I retained Rohe & Freston to represent us in the transaction, and they drew a contract, submitted it to Myers, and Myers changed it and drew another one, and after drawing several contracts, one was finally arrived at which was suitable to both parties.

After the first negotiations and while these tentative contracts were being brought into shape, the plan of the Italo Company on the taking over of properties was changed. The Graham-Loftus properties were purchased and the Edwards property was dropped. By reason of this change the Graham-Loftus was to be purchased for $3,000,000 in cash, of which a million was to be paid down in cash and two million was to be assumed by the company,

(Testimony of R. S. McKeon)

and the syndicate was to receive 6,000,000 shares of stock, for which they were to pay $3,500,000. This $3,500,000 was to go toward the first payment of the Graham-Loftus, the first payment to the McKeon Drilling Company, which was to be a half million dollars, and the company was to pay the half million dollars to us, and the balance of that was to go for the purchase of the other properties proposed to come in, and there was to be a remaining indebtedness of $2,000,000 on the Graham-Loftus properties, $500,000 on ours, and odds and ends of indebtedness on the other properties, which brought the total indebtedness up to $2,750,000. That indebtedness was to be paid off within a year, so that the payments would run between $225,000 and $250,000 a month. Instead of 10,000,000 shares being issued as originally contemplated, 12,000,000 shares were to be issued. So that the net result was that the company was to start out largely in debt and with a larger stock issue and with some changes in the property being acquired.

At first I decided I was not going into the merger on those conditions. Wilkes and I talked the situation over at considerable length. The Continental wells on the Wiley-Tobin lease were drilling at quite a depth, the Graham-Loftus wells were drilling, and our No. 4 well was down pretty deep. The Modoc had a well or two drilling, the Italo Petroleum had a well drilling up at Muscle Shoals, a new field up in Ventura County, and they were drilling a well or two on the Cauley lease, and they had in this merger two hundred odd wells in the northern part of the State in the heavy oil field. I liked the deal pretty well, but I did not like the indebtedness so

(Testimony of R. S. McKeon)

well. When I first started in it was my understanding that the only indebtedness would be owed to us. After discussion further I agreed to go in for the consideration as outlined, the company assuming those debts, and we were to get 4,500,000 shares of stock instead of 3,500,000 shares. That was finally agreed upon and the contracts were drawn in accordance with that agreement, and were finally signed, and the deal was made with the Italo that way.

I have recited the facts of the deal from the beginning of the negotiations up to the point of agreeing upon the consideration, as nearly as I can remember them.

It was my understanding that the Italo Company must obtain a permit from the Corporation Commissioner before the deal could be consummated. The contract was finally signed July 5, 1928, and involved the terms agreed upon between Wilkes, as the representative of the Italo Company, and myself, except as the same were subsequently changed by Exhibit 85 in evidence, which extended the term within which performance should be had.

It was my understanding that the duty of obtaining the permit fell on the Italo Petroleum Corporation and I had nothing whatsoever to do with the application for the permit or the pressing of the permit for the issuance of the stock. If the permit had not been granted, under the terms of our contract we would have retained our properties and the deal would have fallen through. I had nothing to do directly or indirectly with the presentation of the application for the permit or any of the hearings that were had during the time that permit application was pending before the Corporation Commissioner. While the

(Testimony of R. S. McKeon)

application for the permit was pending, I understood it had been delayed a little bit longer than they expected it would be. Myers and Wilkes told me that some of the men who were handling the permit, that there were so many properties, that it necessitated engineers' appraisals, which delayed it longer than they had expected.

I never heard anything in regard to any difficulties that were being experienced by reason of somebody trying to hijack somebody and get money out of them for the permit. If anything of that kind was happening, I knew nothing about it, and took no part whatsoever in it. We did permit auditors to examine our books in connection with making up balance sheets for the application. Our contract was signed on July 5th and the permit was finally obtained, and I attended a directors' meeting in San Francisco on July 6, 1928. That was the meeting where the directors were considering various properties, which they had under consideration, including our own. I had never been to a directors' meeting and I wanted to become acquainted with the men with whom I had now associated myself, so John McKeon, Gordon and Siens and myself went to San Francisco. Our principal reason in going to the meeting was because we knew the directors were going to agree to accept or turn down the proposition of taking our properties into the merger along with these others. I went up as a director and I asked Jack to come up, saying, "You had better come up and get acquainted with the fellows who will be partners with us now." We arrived in San Francisco on July 6th at 9:00 o'clock and the meeting convened at ten o'clock, and we were introduced to various directors who were there at the meeting, and

we talked about the various properties, both Jack and myself. We had some maps there similar to the colored map in evidence, and both Jack and I talked to them to the same extent that we have discussed the matter here today, showing them the various properties, and showed them the productions and showed them the wells and expressed our opinion of the value of the properties, including our own and those taken into the merger, and that is about our interest in the meeting or what we did.

The directors asked us about the various properties already in the Italo and those proposed to be taken in by the merger, and our ideas of the value and the possibilities of oil from various wells, and we told them what we knew about it. They thought we would have more information than they and I believe were dependent on what we told them. It was my understanding that the contract was to be affirmed by the directors before they become operative. When the directors' meeting arrived at the point of affirming the contract under consideration, Jack and I withdrew from the meeting because our properties were interested, and we were not present when they voted on the proposition to buy all of these properties. That was the first meeting of the board of directors I had ever attended.

I was aware that under the contract between the Italo and the McKeon Company the deal would be closed between them on August 15th.

With reference to the testimony I gave concerning deep wells going off of the perpendicular, I would say the following: About the time the wells had become very deep in

(Testimony of R. S. McKeon)

California. The Signal Hill wells were being drilled to between six and seven thousand feet, some a little deeper. On Ventura Avenue they were drilling to 7000 feet and deeper, and so it came up that the old equipment we had been using was too light. The line shafts were twisted off, and the drilling pipe would invariably twist off at those great depths, and it took us a long time to pull out and change the bit. There was invented a hard metal, harder than the tempered steel we had been using, and the old boilers were changed from 70 horsepower to 125, with maximum steam pressure up to 200 to 250 pounds horsepower boilers, and carrying steam at 200 to 230 pounds. Our engines had been increased from small ten by ten steam cylinders up to 14-inch, and our pumps had been enlarged and machinery had been greatly improved in order to facilitate the drilling of deep wells, and with that machinery and all of that power and our hard metal, we could use it in the obtaining of various depths over the machinery we had been using and drilling equipment, and we could give more weight to the water pipe. On one well at 7000 feet deep the drilling pipe would weigh about 50 tons, and we would give it more slack with the brake, and then at that time the wells on the edge of the field that would be drilled with the idea that you would get a small well would turn out to be exceptionally big. Many of the wells that were drilled in the center of the field where you expected to have a large well would oftentimes be a small well or a water well. Many ideas were advanced at first. Geologists had the idea there was a lot of cross faulting and little pools, and everyone was upset, and they didn't know what was taking place, and there was an old

mining surveyor at Fullerton who had done lots of underground surveying and had observed the drifts involved from drilling the mines at angles; so he perfected a surveying machine that could be lowered into the hole and it contained many moving parts, a moving picture camera, a clock, a compass, and plumb bobs, so you could lower it in and take pictures of the drifts of the hole, and he started in in 1928.

The first hole I heard of being surveyed with the Santa Fe Oil Company near La Brea, and the report was that the hole drifted around a 10-acre lot after survey, and I couldn't make my mind up that that was possible. We would put a string of 8-inch casing through a 10-inch, and the clearance through the couplings was probably 1/16 of an inch, and I couldn't imagine how one string of pipe would go through one so nearly the same size and take all of those drifts and angles as the survey showed, but finally I did survey one of our wells on the Fairchild lease. We had drilled this well down to about 6000 feet, and the Hoffman out further on the structure was drilled by the Richfield, and that was a good one, producing several thousand barrels of oil at a time. There was a good deal of talk about crooked hole, and we had this well on the Fairchild lease surveyed and found it had drifted away, but still I couldn't make up my mind that was a fact, but I said, "If this is true it won't be long until we run into ocean or the water sand," which we did. We perforated through the upper Brown zone and made a good well, about 200 barrels; I think it continued that much since. I had great hopes of this well, and after the Italo took it over we surveyed it. It never was large,

(Testimony of R. S. McKeon)

a well of about 250 barrels production. We surveyed that and found it was away off center. It seemed this Thorn well was not on very prolific production. The next well to it came in at 2600 barrels, and then we found a water well that headed for the City Hall at Long Beach. We had a good well here, and here, 2100 barrels, and the old one at 900 or 760. This well right in the middle was a total failure, due to the drift of the drilling.

There have been many instances in which wells that were expected to be large producers turned out to be failures or small producers, and small producers that were expected turned out to be large wells.

We have in the oil fields now appliances to keep the holes straight. Most hole starts off at a drift. Nearly every operator will run in his picture machine and get the exact kind of a hole when he pulls his bit out. He will calculate it to be in a certain direction. There are appliances known as whipstocks. They run it in and drill by it, orient it in with surveyor's transits to point it to the direction they want to straighten it to, and that will cock the hole off in that direction. I believe now a man can drill a well in any holes we have, and he can finish it and get a derrick on there a thousand feet away, just as he wants to; they are doing it every day.

I had nothing whatsoever to do with the formation of the syndicate that was to acquire the stock of the Italo Petroleum Corporation of America, which is known as the big syndicate. I was not a subscriber thereto, although my brother John was.

(Testimony of R. S. McKeon)

After the meeting of July 6th I returned to Los Angeles and continued to operate the McKeon Drilling Company, pending the time when the deal for the transfer of the properties would be consummated. Our contract provided that we were to operate our properties in the usual course of business, to retain any income from them and pay the expenses just as though no deal was pending. I did this and continued the drilling of the wells and the operation of the producing wells. I kept myself informed as to the progress of the various wells being drilled on the other properties to be taken over by the Italo, and as to their production.

On August 15, 1928, at the time fixed for the consummation of the contract, the Italo Company was not in a position to close. Mr. Gordon and Mr. Siens told me that they were unable to pay the $500,000 that was due when they had closed the contract, due to the fact that they had not received their permit from the Corporation Commissioner as quick as they anticipated, and it had only been received a few days before and they had not had time to raise the money to pay the half million dollars. They were just beginning to raise the money and I said, "All right, I realize that you couldn't have raised all of this money in a week or so that you have had," and I granted them a verbal extension.

About that time a deep sand well was brought in in Santa Fe Springs. It was a big well. We originally owned it in 1923 or 1924, and it came in in the Meyer sand, and after the sale of the well to the Wilshire Oil Company they deepened it, so when they brought it in the

(Testimony of R. S. McKeon)

McKeon Oil Company immediately acquired some leases in the Santa Fe Springs field, and proceeded to drill wells.

By the latter part of August I found myself in a bad position. The Santa Fe Springs field had come in, we had acquired some properties there, and by that time had gotten the title straightened up pretty well on them, and we were ready to proceed with the actual drilling of wells that would necessitate the expending of money. Our contract provided that all properties that we had in our possession would become the property of the Italo. I began to have my doubts whether or not the Italo would be able to finance themselves, and I didn't know exactly what to do. If I spent money on the Santa Fe Springs properties, the Italo would get the benefit of that, if they finally closed the contract. If I refrained from acquiring leases or starting wells there and the Italo didn't close their deal, I would lose a good opportunity. So I was perturbed. I looked at the Italo deal and the properties coming in and didn't know exactly what to do. I expressed these views to the Italo officials, to Mr. Gordon and Mr. Siens, and told them I was pretty seriously considering notifying them that the contract had expired on account of not complying with it; so they decided to give me a $50,000 down payment if I would extend the time a little longer, so I did that.

I met Horace Brown about that time. I gave a second verbal extension at the time I received that $50,000 down payment. I went along until the latter part of September, and erected some derricks in Santa Fe Springs and had in mind that if they did close the deal I was going to insist

on the repayment to me of money I would expend on those properties. By the latter part of September we had started actually the drilling of wells and put in some surface casing in some holes, and had gone to considerable expense. Mr. Wilkes and Mr. Shingle were still in New York, and the affairs of Italo were in bad shape. There wasn't any money to pay me with and there were complaints that the stock wasn't being sold very rapidly or the syndicate wasn't raising the money from subscriptions or the sale of stock, so we had another discussion about it and I told them definitely then I had made up my mind to withdraw from the merger.

I understood that under the contract I had the right to notify the Italo Company that they were in default, and that if the default was not remedied within a certain number of days the contract would become null and void and I could retain anything that had been paid to me on account, that is, the contract would be forfeited. After the second talk with them regarding our cancelling the contract, the Graham-Loftus No. 4 well was coming in. I had kept my eye close to that well and watched the course taken by the oil sands, and thought it would be a good well, but notwithstanding that fact I was pretty high on the Santa Fe Springs field, and I told them that I had lost my patience entirely; that Alf was in New York and Shingle was there, and there was no idea apparently of the deal going through, and that I was going to withdraw. So they gave me $100,000 on a down payment and I gave them a written extension to the 15th of November, with the distinct understanding that if on the 15th of

(Testimony of R. S. McKeon)

November they were not able to close the deal I was going to withdraw definitely then and retain the $150,000 they had paid me as liquidated damages, and I made provision in the extension that in addition to that the McKeon Drilling Company would retain as their own property those properties that they had acquired in Santa Fe Springs and that they were not to go into the Italo. We had gone quite a ways with our properties by September. The extension agreement is Exhibit 85, and is dated September 18, 1928. That is about the date that I refer to. That is the agreement by which certain concessions were granted and the time of payment extended to November 15, 1928.

The $100,000 referred to was paid.

With reference to the telegram that has been introduced in evidence, from Mr. Brown to Mr. Shingle, or Mr. Wilkes, rather, Exhibit No. MN, referring to the $100,000 that it was important to make, that is the $100,000 payment I have just referred to.

In my opinion the properties of the McKeon Company transferred to the Italo Company in accordance with that agreement were of a value of five or six million dollars. In considering the value of these properties, I base my estimate on the following things. First of all, I had seen many of the oil wells on the Hill produce more than a million dollars. We had an income there above costs of in excess of $100,000 a month, or in excess of $1,000,000 a year profit. We had a number of wells drilling, in the various stages of drilling, on the various properties, some of them near completed, and it was my opinion that the

completion of those wells would increase our present income considerably. I thought it would more than double it. We had in addition to that a complete unit in the oil field development. We had a large crew of trusted and experienced men, both as to drillers, production men, engineers, geologists, and every kind of man that we needed. We had the finest equipment that money could buy and we could secure leases around there in competition with any company in the country. We had a good organization, and all of those things taken into consideration I don't think I would have sold the properties for five or six million dollars in cash if I had to quit business. If I were just going to take the money and quit the business, I don't think I would have considered that kind of an offer. The fact that I was becoming connected with a larger and growing organization influenced me in the making of the deal. I realized that while we had a number of wells on this property and a number of wells drilling, they were all located in one field, and that many things could happen in the field. I had always dreaded the thought of a fire at Signal Hill which would wipe out all of the wells on Signal Hill. I knew that I was getting a large interest in many properties on the Hill that were as valuable, possibly, some of them more valuable than mine. In addition to that I was getting an interest in hundreds of acres of proven oil lands, with producing wells on them. An interest in the spread of wildcat or prospective, potential oil lands scattered in many States, even in Old Mexico, and was getting associated with men whom I thought and knew had great ability, such as Fred Gordon, Alf Wilkes and many of the men in the company.

(Testimony of R. S. McKeon)

I realized and thought that we were going to have good financial backing, and all those things tended to get me to join in that merger.

The contract was closed October 15, 1928. Before the closing of the contract my brothers, John, Raleigh and myself, had a conversation in regard to the Italo-McKeon affairs. That conversation was in the early part of October and prior to October 15th. Jack called up and said he wanted us to come over and wanted to talk about the Italo matter. I still had my misgivings that they would eventually be able to close the deal, but nevertheless we had this meeting. When Raleigh and I arrived in Jack's office he said that the Italo affairs were in pretty bad shape. He said, "First of all, they didn't have the money to meet a large payment of the Graham-Loftus properties," on which they had already paid three or four hundred thousand dollars, and they could not meet the payment on September 20th. He said, "Alf is back from New York and they can't raise the money in the East that they originally thought they could. To meet the Graham-Loftus payment I (John) have endorsed and guaranteed the payment of $600,000 at the Farmers & Merchants Bank." He said, "In addition to that I have assured them, that is, the other signers of the paper, that if they would secure the money at this time, we would close up our deal with them and go in and put the company over. It has got to the point now where most of the money that has been subscribed to the syndicate is in there because we are in the deal. We have to close this deal up and take our coats off and go to work and get our properties over

(Testimony of R. S. McKeon)

there, and you fellows have to go and take charge of the field operations."

Then he went on and said that Shingle-Brown and another group of brokers were going to take the sale or the financing of the syndicate so the initial payments on the properties could be made, that Lacy had agreed to become president of the company, and that he himself had definitely made up his mind that as soon as he could get away from the Richfield he was going to come over with the Italo and take charge of it and head it, and that the only thing for us to do was to close up the deal with the Italo and make a real company out of it. He said the first thing that had to be done was to get Vincent out of the way. He said he had been misrepresenting things to the public, that he was causing a lot of dissatisfaction among the stockholders, selling stock that he was not delivering, that he was not paying any money to the syndicate, and that the very first thing to do was to get him out of the way. And he said that he had agreed with Wilkes, or if Wilkes could get him (Vincent) out of the way, that he (John McKeon) would furnish some stock to do that out of the stock that we were to receive for our property, that he would furnish that stock to get Vincent out of the way so Shingle and Brown and the other San Francisco brokers could take over the underwriting or the financing of this company. We, especially I, was very provoked at him, (that is, at my brother Jack). He has always had a faculty for endorsing notes for somebody, and I found him here on $600,000 worth of notes, and he was in a bad hole, he was on those notes. If I

(Testimony of R. S. McKeon)

still would stay in my position that I was not going to go into the company until they performed their part of it, why, I knew the Italo was going to crash. Naturally the notes would not be paid, and Jack was on them. We had quite a heated argument. I told him that when I made the deal, I made a good fair deal, and made just as tough a deal that it was possible for me to make with Wilkes or with Italo; that I had safeguarded our interests in every possible way, and that it was rank foolishness of him to have given up that position. But after a good deal of argument and discussion we did agree that inasmuch as he was in the hole there was nothing for us to do but go on with the deal, so we agreed to do it. He had subscribed to another syndicate membership which I did not like. We had 4,500,000 shares of stock and I could not see why he was buying two or three hundred thousand dollars more, but I agreed to do it, and we accepted those subscriptions and accepted $50,000 balance in cash, all that was left us, and closed up *or* deal, or agreed to, and turned our property over, and I moved over to the Italo and took charge of their field operations. That is about the extent of our conversation.

At that meeting Jack said that Wilkes had informed him that when he got back from New York he found a great deal of turmoil in the San Francisco offices, that the brokers whom he was hoping to have come in, that is, Shingle-Brown, Plunkett-Lilienthal and Geary Meigs and the other people, would have nothing to do with Vincent selling the stock. He said Vincent was threatening a lawsuit if he were not permitted to continue the sale of

stock. Jack said the only thing we could do is to get Vincent out of the way, and stated that he had commissioned Wilkes to do that, to make a deal with Vincent, and that he would furnish what stock was necessary within a reasonable amount to eliminate Vincent from the picture. He said that the company was not correctly financed, and a large amount of current monthly payments, totaling a quarter of a million dollars falling due, and that that was a big load for the company to carry; he said that until the payments were all made the properties, the main properties of the company were in jeopardy, and that Wilkes had come back from New York and had found bankers there that were very anxious to finance a large production company on the Coast provided they could get the right personnel in it and the right kind of properties, and that they were perfectly willing to put this money behind him if he would head the company. Jack said his plan was to do that, and that in order to do it he would have to have some money or some means to swing it. He would have to option some of the properties, and he would need money to get it started until the bankers could be in a position where they would underwrite whatever money was needed. So we agreed with him that he could use what of our stock would be necessary for that purpose. By that I mean that Raleigh and I agreed with Jack that Jack could use the stock of the McKeon Drilling Company which it was to receive from the Italo Company as part payment for its properties.

I went into active management of the Italo Company following the transfer of our properties on October 15,

(Testimony of R. S. McKeon)

1928. On midnight, October 15, 1928, we actually transferred all of our properties to the Italo, including our machinery, our men and everything that we had, with the exception of the drilling crews and the wells that we were drilling at Santa Fe Springs. It had been arranged that Will Lacy, Hugh Stewart, F. E. Keeler, Bob McLachlen and Maurice Myers would become directors of the company, and that Mr. Lacy was to become president. We all went to San Francisco and attended a directors' meeting on October 16th, and those men were elected directors of the company, and Mr. Lacy was elected president.

After the change in the board of directors at that meeting, we returned to Los Angeles and the company was to some extent reorganized. There was an executive committee appointed, composed mostly of Los Angeles men, who would meet and conduct the business of the company in the absence of the directors, that is, the executive committee would act as a small board of directors, and that committee was composed principally of residents of Los Angeles, so we started to work to run the company.

I took charge of the field operations, and when we finally had agreed to close up our property, after a conversation with Jack it was agreed that we would change our plans to this extent: instead of my brother Raleigh going over with me to the Italo, he would remain and operate the McKeon Drilling Company, finish the wells that had been started at Santa Fe Springs, and my brother Paul would come over to the Italo and take charge of the Italo operations under me. I used to pick Mr. Lacy up in the

(Testimony of R. S. McKeon)

morning at seven o'clock once or twice a week, and we would make a tour of all the fields here on different days and try to get back at noon so that he could attend to his other business, and in a short time there was a little grumbling heard from the San Francisco people. that is, the Italian element in the company, due to the fact that they felt that by moving the offices of the company from San Francisco to Los Angeles and with the executive committee here, we were kind of taking it away from San Francisco, and there were complaints and grumbling about that, little cliques were forming, and there was a little unrest, a little friction in the company. I knew that Masoni, Perata, DeMaria and the Italian members of the Board of Directors felt as though they were being slighted, and not being consulted much on the conduct of the company. I guess we had the opinion here that they did not know much about the oil business and we did not bother to consult to any great extent with them, and they were feeling and made it evident that they were not entirely satisfied with the arrangement. That dissatisfaction manifested itself to such an extent that when Jack decided that he was going to go into the bigger company and enlarge the Italo and make a real big company out of it, or try to, he decided that he certainly needed the good will or aid or what you might call it of the Italian stockholders in the company, that is, he needed their cooperation.

Jack decided that Shingle, Brown & Company and the other brokers were to be given some stock if they would undertake the sale of securities of the company or the financing of the company and the syndicate. He decided

(Testimony of R. S. McKeon)

that he would give some stock to Perata and Masoni, and would sell some to John B. DeMaria at a cheap price, and that with an idea of keeping them interested in the company and having their cooperation through the newer company, and thought it was well spent to use his stock in that way.

With respect to the disposition of the Italo stock to be received by the McKeon Company, after Lacy became president our company took on a new aspect, the syndicate subscriptions rolled in, the sale of stock started big, and there was plenty of money to pay the contract payments when they became due, and it looked like it was a very feasible thing then to build a larger company out of Italo. So Raleigh and I agreed with Jack that Jack could use up to 2,500,000 shares of stock for that purpose. By that purpose I mean to enlarge the Italo and make a bigger company out of it. We did not know exactly how much it would take, but we told Jack that he could use the 2,500,000 shares, that we would be perfectly satisfied for our end of it if the McKeon Drilling Company retained 2,000,000 shares of stock and that he could use 2,500,000 shares for the purpose of enlarging the Italo or for his own purposes. He had some affairs that he wanted to straighten up, some real estate interests, and it was our understanding that he was to have the stock to do with as he pleased for his own affairs and for the affairs of Italo, including the matter of dealing with Perata and Masoni, the Vincent settlement, and anything else that he thought it was necessary to do.

With reference to reimbursing Shingle-Brown for their efforts which had been made and were to be made in re-

(Testimony of R. S. McKeon)

gard to this other financing, I don't believe at that time there had been any definite amount of stock agreed *up*, at least I have not heard of any definite amount. To some extent they were to receive some of the stock.

With reference to Exhibit 86-B, pertaining to certain entries that were made in the books of the McKeon Drilling Company relative to the transactions with the Italo Company, I know of those entries and read them recently. The matter came up this way: A short time after we had closed our deal by Italo by transferring our properties to them and I had moved over to the Italo office, Mr. Thackaberry, who was secretary of the Drilling Company and its accountant and bookkeeper, was manager of our office, that is, of the McKeon Drilling Company office. It was necessary for the McKeon Company to get the liabilities over to the Italo Company that were to be assumed by it. In starting this new work at Santa Fe Springs, we had acquired other liabilities there. There is no such thing in the oil business as a cash business; you charge everything. Either I or Thackaberry suggested that we call in Mr. Lyons to verify the liabilities, and close up our books as of the 15th of October, and to furnish all data that might be valuable or necessary to the Italo on this deal, so he employed Mr. Lyons to do that. Mr. Lyons went ahead with the work of ascertaining the indebtedness and furnishing other data.

With reference to the exhibits in evidence written by Mr. Lyons, I know that Thackaberry and I discussed the proposition of the income tax phase of the deal with the Italo, as to what our income tax would be. We had re-

(Testimony of R. S. McKeon)

ceived very little money in cash for our properties at that time, in fact I think only the sum of $250,000 in cash, and the Italo Company had our properties, and we had in exchange for them a lot of notes of the Italo. We had accepted $300,000 in subscriptions to the syndicate which we had charged to Jack's account, and the Italo had also assumed our liabilities but had not paid hardly any of them at that time; so we were confronted with the situation of how to set this deal up on our books with a view to the income tax.

This discussion with Thackaberry was following the discussion between John, Raleigh and myself concerning the use of 2,500,00 shares for the benefit of the Italo Company as I have heretofore testified. The Thackaberry discussion was the latter part of November. Thackaberry had been employed in the income tax department years before, and we knew that if we would set that up at a high valuation on our books, that is, give it the full six million valuation, it would show a tremendous profit. The leases we had turned in to the company had been obtained, many of them, for the privilege of drilling wells on them. They stood on our books at a certain cost. Maybe a well that was a big producer would have cost $100,000 or $80,000, and that is the way it stood on our books. The whole group of properties it seems to me as I remember it had cost us about $1,500,000. If we set that up at $6,000,000, we would have to pay a profit on around four and a half million dollars, and we were not at all sure that our considerations were going to be worth four and a half million, or we didn't know what they

would be worth. We had the notes of the company, we had the stock, and we had those subscriptions to the syndicate, and we did not know what they would be worth. We talked about it quite a lot. In fact, I asked him what the position would be if we would set this up at six million as the consideration and made that income tax return at the time it was due, and if by the first of the year the Italo could not perform their obligation and we had to take the properties back. Our stock would then be worthless, and probably most of our liabilities would come back on our hands. Thackaberry said, "You would probably get a refund on it, but getting a refund from the Government is no easy job." So I said, "Well, you get Lyons over here and you fellows figure out to pay the least possible income you can this year on this deal. The next year or the year afterwards the Government will come around and recheck our books and at that time we will know what the stock is worth, and we will know if the notes are going to be paid or not, and if the stock is worth $10 a share, then we are willing to pay income tax on it." That was about my conversation with Thackaberry.

At that time I told Thackaberry that two and a half million shares of stock had been tentatively set aside to be used by John for the enlargement or promotion of the Italo Company or for other reasons. I was not very definite with him as to what that would be used for. At that time we had put the stock up in escrow to remain there for 90 days or as much time as was necessary, in order to give the brokers an opportunity to finance the syndicate and the company, and the escrowing of the stock

(Testimony of R. S. McKeon)

was one of the things that we had agreed to do with the San Francisco brokers when they came down here and took charge of the financing and Vincent went out of the company. I told Thackaberry about that, and that was another reason that that stock might have to remain in escrow for six months or longer. There was really no way as far as I could see that you could do anything but get the least possible value on the stock until some future time when you knew what it was going to be worth and what you might realize on it.

Thackaberry brought Lyons in to work the matter out as an accountant, and the next thing I knew about the entry was early in 1929. It was called to my attention by our attorney, Mr. Clay Carpenter, who said it was a very, very bad entry. He recommended that we tear the sheet out of the ledger and rewrite the entry some way. He said it was a very bad entry and could be badly construed. He said it could be misconstrued. He was concerned more with the giving of this stock to various persons. In the way it was written up and the fact that it was written in there as commissions, he said would be badly construed. However, we did not cause the entry in the books to be changed and it remained as originally made in 1928; it has never been changed at all. I never studied accountancy and am not a practical bookkeeper, and do not know whether the entry correctly reflects the facts for income tax purposes. I have heard many accountants and attorneys talk about the en*rty* and I have not found one that understands it. I know I don't. I don't know whether it is right or wrong, or whether it is a good one or not. But it stands there just as we entered it on the books.

(Testimony of R. S. McKeon)

When I went over to the Italo Company I resigned as president of the McKeon Drilling Company and Raleigh was elected president, and I almost entirely severed my official connection with the McKeon Drilling Company when I became actively connected with the Italo Company.

I had every confidence in Thackaberry, and with reference to the matter of distributing the stock to other people for the Italo's benefit and the obtaining of receipts therefor, he said, "Of course, if this stock is given away or sold it will be necessary to have some form of a receipt or some evidence of who received it, or what the McKeon Drilling Company got for it. We cannot just take in four and a half million shares on a deal or a contract and not account for the entire thing, so be very sure and very certain to secure receipts from anyone for anything that is done with that stock." He suggested at first that we get a receipt from John McKeon for the 2,500,000 shares and then we thought we had better not do that, because if we used that kind of a receipt he would have to account for the stock on his own income tax. So Thackaberry said, "Whatever is done with it, we will secure receipts for it."

I am familiar with some of the recitals in the entries. The recital that $500,000 as a cash payment was received is not in accordance with the facts. The facts are that $300,000 of that supposed cash represented the assumption of subscriptions of John McKeon to the big syndicate. With reference to the recital that notes shall be taken payable monthly and beginning November 15, the original contract provided the notes should start on August 15th,

(Testimony of R. S. McKeon)

but the supplementary part of the contract or the extension provided that they would be accepted as of November 15th. So that recital would be correct as supplemented by the supplemental contract. The recital to the effect that the McKeon Company was receiving 50 per cent common and fifty per cent preferred stock is incorrect. With reference to the recital that the contract provides for commissions, that is incorrect. There were no commissions to be paid. I negotiated the entire deal myself and no one, no agent, had any part or interest in it at all.

I have a copy of Exhibit 116 among my papers. I am familiar with the letter written by myself to Shingle, Brown & Company concerning certain revenue stamps on certain stocks. That letter is dated March 11, 1929, and is Exhibit 116. When we put our stock in escrow with Shingle, Brown & Company on October 26th, prior thereto when Shingle-Brown and the other brokers agreed to underwrite and take the underwriting of the syndicate stock or financing of the syndicate, they insisted that our block of stock be placed in escrow. They found that the International Securities Company had been selling some stock which we agreed to hold for them out of our block at a reduced price, and they had insisted that our block of stock be gotten out of the way so that it could not be offered for sale until after they had completed the financing of the syndicate. I said, "Well, let's just leave it here with Myers, it is in his hands, and we have not called for it and we won't call for it until such time as you are through." They said, "No, it should be tied a little tighter than that. It should be placed in escrow." I

(Testimony of R. S. McKeon)

said, "That will be perfectly satisfactory to me, we will place it in any bank that you say." They said that there were two reasons really why a bank is not the best place to escrow it. The first is that it will cost considerable money to escrow that large a block of stock, and that was not so much of an item to ask, but it was something, but the other reason was this: they said, "If you put it into a bank, on some certain day that escrow will expire. We propose to sell our stock through brokers and there will be many speculators buy the stock or sell short against the stock, and it will undoubtedly leak out the day that this escrow will expire, and that this big block of stock will continually be overhanging the market. We will take it and escrow it ourselves, hold it in our care, and won't charge anything, and no one need to know the date it is coming out or anything about it." So I agreed to that, but I said, "In the event that takes place, I want the stock immediately transferred into the name of the McKeon Drilling Company." Up to that time the stock as delivered to us was all in the name of Maurice C. Myers, in certificates of different denominations. They were endorsed by Myers as trustee, and it had been decided by them that Shingle-Brown were going to get some of the stock, that Perata and Masoni were going to get some, that Vincent was going to get some, and various other persons, and it was discussed whether or not we would keep it in that condition, but I insisted that they were not to get any stock until they had fully performed the services that they were expected to perform, that is, Shingle-Brown were not to get any until they had financed the syndicate and had fulfilled the obligations of the syn-

(Testimony of R. S. McKeon)

dicate to the company. So I said, "We will have this all changed into the McKeon Company's name and then I will know it is safe there, that nobody is going to get their hands on it until such time as we decide it is time for them to have it."

I was taken ill and after the first of the year went to Honolulu and stayed there until the 15th of February, and my return I only saw my brother John for a few minutes.

After this discussion with the brokers the stock was transferred into the name of the McKeon Drilling Company.

On my return from Honolulu I made inquiries as to the way things were going, and along in March there was a continuous correspondence between Mr. Byers of Shingle, Brown & Company, and Mr. Thackaberry of the McKeon Drilling Company, as to the payment of those stamps, amounting to, as they claim, nine hundred and some-odd dollars, and I looked through the correspondence, and I had known that two and a half million shares of it had been used or donated by the Drilling Company and that some men had got it direct without any cash payment to the Drilling Company other than whatever indirect service might have been valuable to the Drilling Company, and I was a little provoked about it. I thought here Shingle-Brown had gotten a half million shares of this stock, Perata and Masoni had gotten another half or quarter of a million shares, which we had given to them, or the Drilling Company had, and, by George! they at least ought to be willing to pay the stamps on it. I said, "That

is carrying things just a little too far, to come back and want me to pay the stamps on this stock," so I sat down and wrote this letter to Shingle-Brown and in it I said, "As you are aware, the balance of the stock was placed in the name of the McKeon Drilling Company only for the convenience of other interested parties." I meant by that language that I was aware that it had been placed there and eventually had come into other persons' hands, and I really should have used "inconvenience of other parties," because that stock was placed in the McKeon Drilling Company's name to be held safely and to be used only if those persons who were to get it were to help put the Italo over and help Jack on the final merger of the larger properties. That is what I meant by that letter.

At the time the stock was put in escrow I had it transferred into the name of the McKeon Drilling Company as a precaution. It was a transfer of the stock into our name and for that purpose I referred to as for the convenience of other parties. I could have accepted the stock and placed it in escrow with Shingle-Brown in the name of Maurice C. Myers. Had I had any idea of irregularity in our dealings or if I were intending any irregularities, I would very possibly or likely have done that, but it didn't occur to me that there was anything wrong or out of the way or reprehensible or off-color at all in our agreement to reimburse Shingle-Brown and the other fellows for helping, not the Drilling Company out of a bad hole, but helping Jack out of a bad hole, and that was the start of the whole thing, that is, on those notes that Jack had signed. I had no idea at the time this was placed in escrow that there was anything off-color about it at all.

(Testimony of R. S. McKeon)

With reference to the letters in evidence dated about December 22, 1928, for the distribution of that stock, the circumstances of writing those letters were as follows: Horace Brown was in town that day and the brokers had fulfilled all of the things that we had expected of them. The syndicate had made their total payments to the company, $3,500,000, or nearly that, and that part of the transaction had been performed. The other persons to whom we had given stock we decided were entitled to their stock. It was getting near the end of the year, and we thought inasmuch as we were donating this stock to various persons, that we had better have it out of our hands before the first of the year. Up to that time there had been few, if any, instructions given, so Jack, my brother, and Horace Brown and myself had lunch at the Biltmore Hotel in Horace Brown's room, and Jack had figured out what each person was to receive, and he said, "Now, I wish you would go over and write out the letters," in accordance with those figures which he had given. As I remember, it was Saturday just prior to Christmas time, that is, December 22, 1928, and I got my brother Raleigh and Thackaberry on the telephone at the office and told them I would come over in a little while and wanted to write the letters about the stock and wanted them to sign the letters, because they were officers of the company; so I went over and wrote the letters, which are those very instructions.

In writing the letters of instructions dated December 22, 1928, I used a guide for the form thereof. In the settlement with Vincent which took place in November

(Testimony of R. S. McKeon)

and early in December, there were a number of things that they wanted straightened up with Vincent. As I remember it, he owed Mrs. Lyle two thousand and some-odd dollars, which she claimed due her for selling stock under Vincent as commission. There was a controversy between Vincent and some of the old California Refining Company stockholders, and other things, so in the final settlement with Vincent we asked Maury Myers to write the instructions to Shingle-Brown, he being more or less familiar with what those various complaints were, and he wrote a letter for us instructing Shingle-Brown about the Vincent settlement; under the settlement we agreed to give him 250,000 shares and to sell him 200,000 shares more, and in order for him to do that he was to perform certain things which Mr. Myers outlined in the letter, and we signed the letter and sent it on to Shingle-Brown.

It was Saturday afternoon and I was writing the letters myself on the typewriter, and we were racking our heads for a form of receipt that would satisfy the income tax department, showing some consideration, and Thackaberry was there, and said we should have that, that is, some consideration for the stock; so finally I went to the file and found this copy of the letter which Mr. Myers had written, and we used a good deal of the same language that is used in that letter.

Exhibit HHH is a carbon copy of the letter that I obtained from the files and used at that time. That part of the letter reading as follows is a paragraph from which I got the language in regard to the commissions and so forth: "For all services of Frederic Vincent &

(Testimony of R. S. McKeon)

Company and the members and employees of said company in organizing, financing and otherwise promoting the said Italo Petroleum Corporation of America." That receipt having been prepared by an attorney, I thought it was a good form and used it.

The particular part of the letter in full from Exhibit HHH is as follows, that the escrow shall receive, among other things, "the receipt of Frederic Vincent & Company for the herein mentioned stock from us, as referred to in paragraph (e) of the first paragraph of this letter, shall recite that it is in full of all demands and in complete settlement and satisfaction of and for all services of Frederic Vincent & Co. and the members and employees of said company, in connection with or affecting in any manner the Italo-Petroleum Corporation of America, and in particular all services of Frederic Vincent & Co., its members and employees, in organizing, financing and otherwise promoting the said Italo Petroleum Corporation of America."

Exhibit HHH is where I obtained the language used in these various letters of instruction dated December 22, 1928.

On December 22, 1928, when we wrote these letters of instruction, I understood that the stock referred to was owned by the McKeon Drilling Company and have always so understood that it was owned by the McKeon Drilling Company, from the time it was delivered from the trustee, Mr. Myers; I understood that with the exception of the use by Jack McKeon to whatever purpose he wanted to put it.

(Testimony of R. S. McKeon)

These letters of instruction dated December 22, 1928, bear the same language that is contained in Exhibit HHH. The letters of instruction written on blank paper are signed by John McKeon, and those on the stationery of the McKeon Drilling Company are signed by R. B. McKeon and Thackaberry, or either one or the other of them. The peculiarity you will notice in all of Jack's letters, that is, the ones signed by him, is that he refers to 3,500,000 shares of common stock and 1,000,000 shares of preferred stock, which was wrong. There were 3,440,000 of common and 940,000 shares of preferred stock in escrow. That was a mistake of Jack's. He never did pay much attention to details anyway. He had forgotten about the other thing, and those letters were not written at the McKeon Drilling Company office. Those were written at some date subsequent to that, but dated December 22nd. The date, you will notice, is put in by lead pencil and signed by Jack.

After we had made the distribution at the Drilling Company, Horace Brown and myself went back to the Biltmore Hotel, where we met Jack later in the afternoon, and that was the first time that Mr. Myers ever was mentioned as the recipient of the stock, and I insisted that he receive some of the stock as long as they were giving it away to the rest of the persons. I said, "You are getting pretty liberal with this stock, giving it around to the different persons, and it seems to me that Mr. Myers has done as much to aid the company, working night and day on it, and is certainly entitled to as much stock as anybody, if you are going to be so promiscuous with it," and they all agreed and that is how it

was given to Mr. Myers. The others acquiesced in the proposition that some of the stock might be donated to Mr. Myers. That is the first time that the question of a donation of any sort to Mr. Myers came up, and it was at my suggestion.

Following December 22nd I went to Honolulu and returned about the 15th of February, 1929. Jack told me he was leaving for New York and wanted to see me, and I went up to the Biltmore Hotel and there was quite a crowd of New York people there, and I had very little time to talk with him about what was going on. He said, "This crowd of New Yorkers are going to furnish me a lot of money. I have taken a lot of options on properties and they are going to put in at least $30,000,000 behind me, and I have hired Clay Carpenter as our attorney and he will tell you the details." That is about all the conversation I had with Jack before he left for New York.

While he was in New York he wired out to get data about the wells they were contemplating taking into the new company, and kept me informed as to the progress of his negotiations in the East, and I would wire him whatever information I could that he might want, or write him letters. So one day Horace Brown came in to see me and he said, "Bob, the stock market is pretty good on this Italo thing now. If you fellows want to improve your cash position, I believe I could work off a hundred thousand dollars worth of this stock for you without hurting the market any." I said, "Well Horace, I would like to see the cash position improved a little, but Jack tells me he is going to have his deal closed up very soon,

(Testimony of R. S. McKeon)

and I think it is very advisable to keep this large block of stock intact so we will have it to use any way that is necessary in this merger." He said all right. So that afternoon Paul Masoni came in to see me. I said, "Paul, Horace tells me he suggests the breaking up of that escrow today." I said, "What do you think of it?" He said, "Why, I got my stock three or four weeks ago." And that is the first time I knew that the escrow had been broken up.

I then called Fred Shingle on the phone and I said, "What in the world has happened up there, Fred? I understand that escrow has been broken up." He said, "Yes, it has," and I said, "Well, that's a fine thing. I put the stock in there and I am the last fellow to find it has come out of escrow." He said, "Well, what's the matter with you, Bob? Something wrong with you? You fellows have most of your stock." I said, "If we have, we haven't seen any of it." So I sent Mr. Thackaberry that night with Clay Carpenter up to check up on the escrow and see what had happened, and they went up there and found that the escrow had been broken up and the stock delivered to most of the various persons, and that about a million shares had been placed up with Dabney as collateral for the note, and found out that the stock had been distributed. So they phoned to me and said that I had better come up to San Francisco, and I went up the next day and had quite a lot of words with Fred Shingle, but I was pretty provoked about it. We had quite a heated discussion or words about it, and so finally we drew down all of the remaining stock for our-

(Testimony of R. S. McKeon)

selves that was in escrow, and the escrow was finally ended then.

I learned, however, as a matter of fact, that so far as Mr. Shingle, the escrow holder, was concerned, the escrow had been broken up by directions in accordance with the McKeon Drilling Company original directions, but I didn't know that, so that my heat against Mr. Shingle at the time was not warranted. The stock was not delivered to Maurice Myers in payment for attorney's fees, as Mr. Spalding testified. My purpose and my idea in delivering the stock to Myers was that there were not any attorney's fees involved in the transaction at all. The McKeon Drilling Company had paid Spalding & Myers for all services ever rendered, paid them in cash. I considered that the Italo was capable and should pay them for any direct services that they had done for the Italo, and this was given just like it was given to the other persons by the McKeon Drilling Company for their aid in the Italo. That was all. In my mind there wasn't any consideration of attorney's fees at all. I do not know, however, how Spalding & Myers treated that transaction. All I know is that in my own mind I regarded it as a donation made, and if they treated it as being payment of attorney's fees, that is something I know nothing about.

With reference to the transfer of some of the Italo stock belonging to the McKeon Drilling Company to Mr. DeMaria, we agreed to sell him some stock for $200,000. I believe it was 250,000 shares and he was to receive delivery of the stock at the time the stock came out of escrow. That was a sale to DeMaria. He paid $50,000

at one time, and about the time the escrow was broken up he paid us about $90,000. He paid us a total of $110,000 and gave us his and Tommasini's note for $90,000. The stock had declined in price, so we settled up at the end of it for more stock than he had originally bargained for at the then market price, that is, to make him out the $200,000 I gave him 10,000 more shares at that time; I believe those were the figures. It was a purchase and sale and not a donation.

With reference to the 25,000 shares of stock going to Hugh Stewart, I will say this: In the early summer of 1929 this eastern consolidation or financing that Jack had been working on had pretty definitely come to an end, and Mr. Stewart was one of the directors of the Italo Company. I had been general manager of the company since April, 1929, and each month we were confronted with the payment of around $250,000 on the purchase price of the properties that had not been fully paid. We had an audit made by Peat, Marwick & Mitchell and found that the total indebtedness of the company at that time exceeded some $3,000,000, and it was all current. We had to adjust it every month, make what payments we could, and it was a very hard load to carry. We thought it would be very possible to fund those debts in some manner, either under a bond issue or a large loan, and I told Mr. Stewart if he would assist me in financing such a loan (he was a banker, and had been connected with the Farmers & Merchants Bank here for many years and was a financial man, and I felt he would have much more success in securing or finding such a loan than I would) I would give him that stock as a present

(Testimony of R. S. McKeon)

or a bonus for those services. As a result, I agreed to and did pay Mr. Hugh Stewart 25,000 shares of stock for his services in endeavoring to bring about a funding of the indebtedness.

About April, 1929, the company was in need of money, as those large payments were due, and we had to pay Graham-Loftus $166,000 every month, and we had other obligations, and had incurred indebtedness for the drilling of wells that were due monthly, and had to be taken care of, so we had to have $300,000 at that time, and had already a loan from the Farmers & Merchants Bank of close to $700,000, about the limit they could loan the company. And so the Board of Directors and some others agreed to loan $300,000 to the company. We made up a pool totaling $300,000. The McKeon Drilling Company loaned 50,000, and the following persons $25,000 each: Mr. Stewart, Mr. Gordon, Shingle-Brown, Mr. Wilkes, Mr. Masoni, Mr. Perata, Mr. Siens and DeMaria. That made up the $300,000, which was actually turned over to the Italo Company and used by it. When the loan fell due it was not repaid by the company. The company was unable to repay the loan, which was a 90-day loan. At the time we made it we thought we would be able to make a $3,000,000 loan on more favorable terms, to be spread out under a bond issue or some method that would not require such large monthly payments. Mr. Stewart was working on that matter, but we had been unable to secure that loan and the bank loan was beginning to get rather old and they were somewhat worried about it, and Buck & Stoddard had a large account that was past due and we had renewed some of their notes a time or two, and so

the McKean Drilling Company had received no payment for a number of months for the $500,000 worth of notes; I think they had at that time and were still holding close to $400,000 worth of those original $500,000 notes. Some of the directors were not *not* so keen about renewing the note. By that I mean the directors who made up the pool of $300,000. I made this proposition to the bank: Our properties were held under a sort of sales contract agreement, and any time we wanted to we could have taken our properties back in the event they had not been paid for. The bank was a little concerned about that, because they had practically unsecured notes. So far as the properties were concerned, some part of the note, I think $250,000 of the loan, had been endorsed by John McKeon and several of the directors, I think Masoni and probably Perata and DeMaria and Rolandelli had endorsed them, and the rest of it was unsecured. The Graham-Loftus indebtedness was secured by the Graham-Loftus properties, and our indebtedness was secured by our properties; so I made a proposition that if they would extend their notes another 90 days, if the bank would agree to extend theirs another 90 days, that the McKeon Drilling Company would now deed their properties to the company and take unsecured notes, the same as the rest of them had, and that further we would not expect any payment on our notes until after the first of the year 1930, and further, that if a bond issue or a refunding proposition could be found and worked out, we would take in lieu of our notes, if it would aid the situation, the bonds of the company, and it would save the underwriters of selling that much of the bonds; so we made that propo-

(Testimony of R. S. McKeon)

sition and it was accepted. All of those loans were extended, and we *deed* our properties and gave bills of sale for the personal properties to the Italo Company at that time. By so doing we let go entirely of the security that we had for our indebtedness. I think that was about July, 1929.

The agreement was carried out and the security was surrendered and the indebtedness of the McKeon Company extended. At the same time the McKeon Drilling Company guaranteed the indebtedness of the Italo Company to Buck & Stoddard of $190,000. That indebtedness was for supplies and materials that had been purchased by the Italo Company, and the McKeon Company, by guaranteeing the payment of it, obtained an extension of it.

We gave Mr. Stewart full authority to solicit and negotiate the loan, and the directors appointed a committee to look after the financing of that hoped for $3,000,000 bond issue. Fred Gordon, Hugh Stewart and myself were on that committee. We called on a few of the investment bankers here in town and found that other brokers were out looking for the loan who had no connection with the company, so we made Hugh Stewart the sole man to solicit the loan, due to his financial experience and financial standing in town, and gave him a letter to that effect, that nobody else had any authority to do it. From then on he did the soliciting of it and our connection with it was preparing what figures he might want, or exhibits, but he did the actual soliciting of the loan from then on. I went ahead with my efforts to make financing arrangements, but we did not succeed

in getting through the $3,000,000 of financing. It was in connection with Stewart's services in endeavoring to arrange that financing that we transferred to him the 25,000 shares of stock.

At the time the original $300,000 was raised, Jack's efforts in the East looked like they would not be successful. He was still there, but the company was dragging along, and we thought that Italo just should do some financing on a loan of some sort itself. The money, however, was originally loaned just as temporary money to help the Italo over a bad place. It needed money very badly at that time. It was impossible for it to repay the loan. When the notes became due, about a 20 per cent payment was made on the $300,000, and the notes were renewed.

The reasons prompting me in foregoing our lien or claim upon the property at the time that I did were these: I considered the notes eventually would be paid, whether secured or otherwise. I considered that the assets of the company were perfectly good and I could really see the objection of the other unsecured creditors to my position as being totally secured. I felt that if we could forego any insistent payment of those at that time that within a few months the Italo would be well able to take care of all of its current indebtedness, if it could just get by without anybody insisting upon payment, and for that reason I gave up this security. I thought it would be a help to the company, but I really did not think I was giving up anything, because I thought the notes were good. Buck & Stoddard had been carrying the $190,000 account and it had been gradually growing. They had gotten some

payments along the line, but the account had been gradually growing, and they had their account at the Farmers & Merchants Bank. That is where they carried the Italo notes, and the bank was pressing them a bit for that. They said they were getting pretty full of Italo paper, and the McKeon Drilling Company had traded with Buck & Stoddard for many years, bought millions of dollars worth of goods from them in times past, and I realized that this extensive credit had been given by Buck & Stoddard to the Italo a good deal on account of my connection with the Italo, and I felt the Italo was perfectly responsible for the notes and we endorsed or guaranteed that paper to enable Buck & Stoddard to continue to carry it at the bank and make a new deal for everybody. I thought that the guaranteeing of the indebtedness of the Italo Company to Buck & Stoddard would help the Italo Company, and that was my purpose in doing that.

In January, 1930, the Italo Company was indebted to the McKeon Company in a sum of between $350,000 and $400,000.

At that time my brothers, particularly Raleigh, were beginning to get insistent on collecting some money from the Italo. Raleigh said, "Here they have had our properties now for more than a year, the properties have produced a lot of oil and lots of money and we have never been paid; everybody else has been paid, and it is about time that we began to look out for ourselves a little and collect this money." After some discussion, I said, "They can't pay it; it is impossible for them to pay at this time, but I will make you this proposition: I am right in the middle of

the Italo situation and know they can't pay, but I know that if they have time to work out their situation they will be able to pay all their bills, and it will be really a successful company. I still have hopes of being able to finance or find a loan somewhere to fund those indebtednesses, and we have reduced the indebtedness considerably under $3,000,000. I will tell you what I will do, I will take the Italo paper and will trade you my interest in the Drilling Company for that." And we came to that deal and I traded my interest in the Drilling Company to them for the Italo paper, and took the Italo notes. I thereupon became the personal owner of those notes of the Italo Petroleum Corporation of America that were owing to the McKeon Drilling Company. I think that amounted to about $370,000 plus some interest. Since that time I have not been a stockholder in the McKeon Drilling Company. That transaction occurred early in 1930, I believe in the month of February.

I was in control of the management of the Italo Company from April, 1929, until December, 1930, and during that time I arranged for and brought about the payment of indebtedness of the Italo Company to various of its creditors to the extent of about $2,000,000. During that period about $350,000 to $400,000 was owing to the McKeon Company, and during that period when I paid $2,000,000 to other creditors of the Italo Company only $12,000 was paid on the claims of the McKeon Drilling Company in reduction of that $300,000 that the McKeon Drilling Company had loaned.

By paying the indebtedness of the Italo Company to the other creditors and not causing any payments to be

(Testimony of R. S. McKeon)

made upon my own, I did not think I was hurting the Italo Company. During that period the McKeon Drilling Company had borrowed some money on the Italo notes and contract, and those notes were at the bank, and in order to keep the paper in the appearance of good paper to the bank on the day the notes would be due, the Drilling Company would pay the Italo or lend the Italo money and the Italo would pay the notes at the bank, but our indebtedness or their indebtedness remained about the same in those transactions. But that is the way it was paid. We loaned the money to the Italo and they would pay the notes at the bank.

The other creditors of the Italo were paid in preference to the McKeon Drilling Company being paid, at my direction, because I had full confidence in the ultimate receipt of the money and I could always use that as an argument to other creditors when they began to get insistent, by saying, "Here I am; I am sitting back and not paying myself a dollar, really, to help carry the credit of the company along." My purpose in doing that was to help the company and not to harm it, and I believed the company would eventually work out.

When I first became actively connected with the Italo Company I was supposed to have a salary from the Italo Company of $1500 per month. I did not collect that salary from month to month, and about the middle of 1930 I did collect some salary. I had always had a salary from the Drilling Company of $1000 per month, that is, Jack, Raleigh and myself used to draw $1000 a month as salary for our living expenses, and we always took that, and I drew that salary from the Drilling Com-

pany up until I sold out and took the Italo notes. Then I had no salary, and my living fee stopped. So a few months after that I told the executive committee of the Italo that I had to have a salary, that I was not collecting any money and I thought I was entitled to a salary, so they gave me a salary of $1000 a month, and from that time on I drew it for a few months, that is for possibly six or seven months, and that is the only salary I drew during the entire period that I served with them. I was not trying to hurt the company in any way when I refrained from collecting salary from month to month. I do not know why I did not collect my salary according to the agreement from the beginning, but I had this salary from the Drilling Company and the company was having rather a hard time. Every time I had a dollar they would press us for it, and I just thought I would wait until it got a little better on its feet. I had my salary from the Drilling Company and they continued to pay that and it was sufficient for my needs.

After I became manager of the Italo Company I devoted my entire time to it, and the real reason I did not ask for my salary from the Italo Company is that I was not hard up for the money and did not have to ask for it. After I sold my stock in the McKeon Drilling Company I needed the money to live on.

In all of these financial transactions that I have detailed, had between myself and the Italo Company, I was endeavoring to serve the best ends of the company. There was never at any time during the negotiations for the selling of the McKeon property to the Italo Company any understanding that any part of the proposed consider-

(Testimony of R. S. McKeon)

ation from the Italo Company to the McKeon Company should not be paid but should be divided back among directors or others connected with the company. There was no agreement of that kind at all. Up to the time of the making of the actual deal, I dealt with the Italo Company at arm's length the same as I would deal with anybody else. Even though I was elected a director of the Italo, I had forgotten about it and had not thought about it. I was sitting on that deal on the McKeon Drilling Company's side of the table. I was acting for the McKeon Drilling Company, getting the best possible deal. I did not offer anything in the way of reward or inducement to anybody connected with the Italo Company to further or encourage our properties. The Italo Company was after us for the deal; I was not after the Italo Company for the deal at all.

I believed at all times that I was making a fair and upright and honest bargain with the Italo Company for the sale of our properties, (the McKeon Drilling Company properties to the Italo). There was not at any time preceding the sale any understanding, directly or indirectly, between me and anybody else, or to my knowledge between any other parties, that any part of the consideration that was being paid by the Italo Company under the terms of the contract should be rebated to or paid back or in any way enjoyed by anyone else.

With reference to Exhibit 251, which carries a report of the auditing company of Peat, Marwick, Mitchell & Company, I am familiar with that report, which was obtained by the Italo Company, and is dated July 29, 1929.

(Testimony of R. S. McKeon)

That report was made for two purposes. At the time I became general manager of the company I called in this auditing company to make a thorough and complete audit of the affairs of the company for the purpose of ascertaining what the company had. The company had been quickly thrown together, and to get a real concrete picture of what the company was doing in the way of earnings, if anything, what its indebtedness was, and all of that, with a view to informing ourselves, that is, the directors, of that condition and with a view of getting the balance sheet by a well known auditing firm. I considered Peat, Marwick, Mitchell & Company among the best, or at least recognized as the best among financial people of all the auditing firms, and so I hired them, to get a balance sheet by a large auditing company that we could solicit a loan on by showing what our earnings were, and that was the purpose of that audit. There was no ulterior or dishonest purpose attained by me in regard to having that audit made.

When the audit was completed I took it for granted that it was a correct and proper audit and set up a proper balance sheet. The only thing that was left in the audit sheet besides the balance sheet was as to the judgment or expediency of writing down of the value of assets, according to that report. The auditing company did that at my suggestion.

When the audit was received it was mailed out in general circulation to the stockholders for the purpose of giving them a definite and correct statement of the situation of the company, because I believed they were entitled to that information. We made no suggestion to

the auditors with the exception that everything be included with a thorough audit of our stock transactions and a thorough audit of everything, and the company would feel that it was all right to give the stockholders and directors the same information we had, and we did do that. The stock was being traded in every day in the market. I did not think that the stockholders would be deceived or defrauded in any way by the issuance of that true statement of the affairs of the company.

With reference to Exhibit 67, a letter from Mr. Wilkes to Frederic Vincent & Company, purporting to quote a telegram received from me, I do not recall sending that telegram to Mr. Wilkes, but I probably did, and the information set forth in it is correct as I understood the matter.

I had nothing whatsoever to do with the preparation of Exhibit 78, which contains a tentative report of an accounting firm. But I think it is substantially correct as a tentative report of the condition of the company. I know of nothing fraudulent or deceptive about it.

The company had a contract concerning the Trumble patent. Mr. Trumble was an expert refining man, a refining engineer. He had in the past invented some cracking process for the refining of oil. The company entered into an agreement with him whereby he had a plant at Alhambra with this process he had perfected, a little laboratory plant, where he could take a barrel of residuum or of the oil that you would get from the ordinary refinery after the gasoline, kerosene, naptha and lighter things had been taken out of it, just fuel oil. He took it out to that plant and actually refined about 60 or

70 per cent of the barrel into gasoline with his little experimental plant. So the company entered into an agreement with him that they would furnish him a certain amount of money, I think it was $35,000, to build him a commercial plant and furnish the site. He started the erection of the plant; it was to be at least 500 barrels a day capacity, I believe. It was on some property owned by the company at Hynes. After he built the plant, every time he would start it in operation it would catch fire, and finally he spent the money that was agreed to be furnished by the company and a little bit more, several thousand dollars more than the original contract provided for, and because of that the company hired an engineer, whose name I do not recall now, and paid him $100 a day. He was a refining engineer and we hired him to make us a report on the plant, which he did. He was slightly doubtful as to the ultimate success of those experiments. Among the reasons for the fires was that the Trumble patent operated under a heavy pressure at extremely high heat; I think he had eight or nine hundred pounds of pressure per square inch and the oil at eight or nine hundred degrees Fahrenheit of heat, and what are called wild gases, which are inflammable, would come right through the metal he was using in his experiments, and burst into flame. So we were not in favor of spending any more money on Trumble. According to our original plan, after it had successfully operated for thirty days, we had an option to buy all of his patents for 200,000 shares of stock of the Italo Company (I think that was it; I won't be sure about it), and so we maintained at the end of that time we had our option on his patent or

(Testimony of R. S. McKeon)

patents he might in the future make in the refining business, but it was up to him at his own expense to perfect a plant and make the plant operate for thirty days; that we had performed our end of the deal and it was up to him to perform his end. Along in 1930, I believe it was, he said, "I can't find any financing to perfect my patents here, because when I do, if I ever make them perfect, you fellows can buy them for 200,000 shares of Italo Stock. I have a crowd of men who will finance me further, if I can get something to attract them. Under the present arrangement I can't get enough from the patents except 200,000 shares of Italo stock." So we finally discharged the contract on a basis like this: that he was to go ahead and perfect his refinery, and if at any time he perfected it or if at any time the Italo could use his process that he might perfect, I think on the understanding of 10,000 barrels a day free of any royalty cost, and he said it would allow him to interest the persons to furnish the money for further experiment. Very shortly after that time Mr. Trumble died suddenly, so the thing stands there. We have whatever right he had in his patents, but they have never been demonstrated as commercially successful, so that is the situation today. The Italo still has whatever rights there were in it. It is true that the Italo Company had control of the Trumble patents under contract.

With reference to the 60,000 units of stock, we actually sold that to the International Securities Company prior to the making of the escrow with Shingle, Brown & Company, so that prior to turning the stock over to Shingle, Brown & Company in escrow we deducted that 60,000

units from the total amount of 4,500,000 shares of stock that we were to receive. In addition to that another 500 units was necessary to make the total number of shares necessary to fill the International Security Company sales of 121,000 instead of 120,000. That was just an error in the amount of the stock, which was straightened out.

With reference to the minute book of the McKeon Drilling Company, Exhibit 94, page 24 thereof, in which there appears a correction as to the consideration, the figures being changed from five million to six million, that relates to Exhibit 44, the contract of July 5, 1928. I made that alteration by changing the typewritten portion from five million to six million. The reason for making the change was this: the meetings of the McKeon Drilling Company directors were more or less informal, and we often wouldn't sign the minutes for some time after they were in the books, and I was running through the book one time to sign the minutes and I happened to discover this error in the minutes, and I just scratched it out and put the correct figure there and put my initials there, as you would do when you are correcting a contract. There wasn't any possible construction of that contract, as I considered it, that could result in a construction of five million, but it could be six million. In making that correction I was simply correcting the minutes and was not increasing the value of the stock that we were receiving; changing it from five million to six million, I put my initials along side of it to show who had made the correction.

(Testimony of R. S. McKeon)

After I became manager of the Italo Company I made a detailed report of the company's affairs to the board of directors, which was spread upon the minutes of the company, and I had no sinister purpose of deceiving anybody in so doing. That was the exact condition of the company as I found it and understood it, and I tried to set it out in detail. The purpose was to inform the directors of the condition of the company, which I deemed it proper for me to do. That report was in April or May, 1929.

Exhibit 96 was prepared by Mr. Lyons and submitted in good faith, without any attempt to deceive the Italo Company, and also for the purpose of giving details as to the indebtedness which the company was to assume.

The report to which I referred as having been made by me to the board of directors of the Italo Corporation was made on May 14, 1929, and appears beginning at page 246 of Exhibit 16-B. I made that report a few weeks after I became general manager of the company, for the purpose of informing the Board of Directors of the situation of the Italo as I saw it at that time, as to its properties and its financial condition, and to the best of my knowledge and belief it is a correct report of the actual condition of the company at that date.

I have never seen Exhibit 331 before. I think that about June 5, 1928, the McKeon Drilling Company properties were producing about $100,000 per month from oil and about $20,000 from gas.

Where letters appear in evidence from the McKeon Drilling Company bearing the initials R. S. M., and signed

by Thackaberry, those letters were written or dictated by me after I resigned as an officer of the Drilling Company because I was familiar with the transactions, but signed by Mr. Thackaberry or my brother Raleigh McKeon because they were officers of the company. This is true with respect to Exhibit 126.

After the transfer of the McKeon Company properties to the Italo Company they continued to produce upon the same basis that they produced prior to the transfer, and produced net October 15th to December 31, 1928, $280,000, approximately, and for the year 1929, $900,000. There was a marked change in the condition of the petroleum business following the taking of the properties over from the McKeon Company and these other companies.

CROSS EXAMINATION

(By Mr. Wood:) Previous to the consummation of the contract between the McKeon Drilling Company and the Italo Petroleum Corporation of America, I dealt exclusively with A. G. Wilkes on the details of that transaction, and no other defendant participated in those negotiations that led up to the contract. In those negotiations between Wilkes and myself, reference was made to what was to become of the deal in case a permit was not granted by the Corporation Commissioner. I never gave the 4,500,000 shares of Italo stock any value, but I considered the properties worth six million dollars. The stock had a par value of $1.00 per share.

Exhibit 44 provides for the execution of promissory notes, if the stock was not delivered. Said notes aggregate $4,500,000.

(Testimony of R. S. McKeon)

In all the negotiations that I had with Mr. Wilkes there was nothing said at all concerning any secret profit or anything that was not a legitimate item of discussion. That contract is our entire agreement. I do not know of any secret profits that were made, and did not participate in any arrangement or agreement of any kind wherein any secret profits were realized by myself or anybody in this case.

With reference to Exhibit 85, with reference to properties that have been acquired since July 1, 1928, that refers to Santa Fe Springs properties.

Upon my return from Honolulu Clay Carpenter told me about the matters that had transpired during my absence, including the negotiations with the bankers in New York, the properties which they had under option, and the properties which they contemplated taking into the Italo in addition to the deal, and he was engaged at that time in the formation of the McKeon Oil Company, a Delaware corporation, to be used in this merger. I discussed with Mr. Carpenter the status of the stock that had previously been escrowed with Shingle-Brown. We went through all of the files of the McKeon Drilling Company pertaining to that stock of the Italo Corporation, and looked at all of the letters and instructions and everything that was in the file, most of which have been introduced here in evidence.

DIRECT EXAMINATION

(Continued)

The statement in my report of May 14, 1929, relative to Acme No. 3 well and the drifting of the hole off of

structure, refers to matters testified to by me regarding the tendency of wells under high powered machinery to run off of a perpendicular line.

CROSS EXAMINATION

(By Mr. Simpson) Raleigh McKeon was not present at the conference held in the Biltmore Hotel on December 22, 1928, between my brother Jack, Horace Brown and myself. At that time my brother Jack gave to Mr. Brown, as the representative of Shingle, Brown & Company, the escrow holders of our stock, certain written instructions for the distribution of some of that stock. Mr. Brown did not in any way whatsoever direct the distribution of any portion of that 4,500,000 shares of stock belonging to the McKeon Drilling Company. He was present there in the capacity of escrow holder, but had no direction as to the distribution of that stock at all. Subsequent to that conversation, I went over to the McKeon Drilling Company offices and wrote up some more instructions for the distribution of some more stock. Mr. Brown had no part in giving any directions for the distribution of that stock. The instructions that were signed by my brother John and the officers of the McKeon Drilling Company for the distribution of that stock were directions to Shingle, Brown & Company, escrow holders, for the distribution of approximately 2,000,000 shares, the stock to be distributed at the termination of the escrow, and any balance of stock remaining to be returned to the McKeon Drilling Company.

On December 22, 1928, it is a fact that prior to that time I had no understanding of any kind or nature with

(Testimony of R. S. McKeon)

Horace Brown that he personally was to receive any portion of that stock. I did not have any understanding that I can recall with Shingle, Brown & Company, but it was my understanding that they were at some time in the future, if they would perform the services for financing the syndicate and the Italo, to receive some stock, and until that day I didn't know the amount. I myself had no understanding along those lines prior to that with Fred Shingle or Axton F. Jones. The understanding that I am referring to I had that Shingle-Brown was to receive some of the stock was the understanding I testified was had between John, Raleigh and myself. Those are the only two persons with whom I had any understanding relative to that stock.

With reference to the conversation I had with Mr. Brown in the spring of 1929, pertaining to the disposal of some Italo stock, Mr. Brown told me in substance that the syndicate was not then distributing stock at the prevailing market prices, and that some of the Italo stock owned by me and my brothers could be sold upon the market without in any way hurting the market, if that would be of any advantage to us, in connection with the formation of this big company, in order to raise money to meet our obligations. I remember him saying, "If you wish to improve your cash position now, I can sell $100,000 or so worth for you now without hurting the market or without damage to anything or anybody." By improving our cash position I understood that referred to the cash position of the McKeon Drilling Company and my brothers and myself.

(Testimony of R. S. McKeon)

In the spring or summer of 1929, Eddie Lyons and myself talked with Horace Brown about the financial condition of the Italo Company and its refinancing, and Mr. Brown told me in substance that so far as Shingle, Brown & Company was concerned I could be assured of their cooperation and support in connection with the larger company, but that they were primarily interested in financing a larger company with my brother Jack McKeon at the head thereof.

All of the negotiations between the McKeon Drilling Company and the Italo Petroleum Corporation of America for the sale of certain of the assets of the McKeon Drilling Company to the Italo Company were had between myself, representing the McKeon Drilling Company, and Mr. Wilkes as a representative of the Italo Petroleum Corporation of America, and neither Fred Shingle nor Horace Brown nor Axton F. Jones had anything to do with those negotiations.

CROSS EXAMINATION

(By Mr. Olson:) Mr. Westbrook was not present at the meeting of the Board of Directors when the proposal to sell the McKeon properties to the Italo Corporation was voted upon.

CROSS EXAMINATION

(By Mr. Wharton:) I am 46 years old, and during all of my life I have been more or less engaged in the oil business. I became a member of the board of directors of the Italo Petroleum Corporation of America on March 10, 1928, and I believe I am still a member. I

(Testimony of R. S. McKeon)

was elected vice-president of the company about June 5, 1928. At that time Paul Masoni was secretary and treasurer of the corporation, and resigned on April 30, 1929, on the same day I became secretary. I became general manager of the corporation on April 18, 1929, succeeding A. G. Wilkes as general manager. I continued as such until the receivership in December, 1930.

I became production manager of Italo about June 5, 1928. As director I performed my duties as far as looking out for the interests of the corporation was concerned to the best of my knowledge and understanding. During a portion of that time I was also connected with the McKeon Drilling Company, which was owned entirely by my brothers and myself. During the negotiations between the McKeon Drilling Company and the Italo Company, I looked out for the interests of the McKeon Drilling Company to the best of my ability and understanding. The Italo was endeavoring to purchase the Graham-Loftus properties about the same time they were considering the McKeon Drilling Company properties. I had no financial interest in the Graham-Loftus properties, and I was very desirous, inasmuch as I was going into the merger or the transaction with our properties, that the Italo also obtain the Graham-Loftus properties, with which I was familiar. The Graham-Loftus company was owned by Mr. Graham and Mr. Loftus and about twenty other stockholders. Mr. Graham was one of the oldest oil men in the State of California, and Mr. Loftus was and had been his partner for a number of years. Both of them had engaged in the oil business in the Signal Hill district. Graham and Loftus and their associates did not

own the fee title to the properties, but had them under lease. They owned the stock of the Graham-Loftus Corporation, and that stock was acquired by the Italo Company. At that time I believe there were two wells drilling on the Graham-Loftus properties, and about four wells producing. There were three old small wells and one large well. I think on other properties there were probably three or four wells, making a total of about eight producing wells, on all of the Graham-Loftus properties that Italo took over. They were producing about 5700 barrels a day at the time of the negotiations. The Graham-Loftus properties were taken over by Italo for a $3,000,000 consideration. I understand that a commission was paid on that deal, my understanding being obtained from an audit that was made for the Italo Petroleum Corporation, by Peat, Marwick, Mitchell & Company. I understand that $40,000 commission was paid.

All of the negotiations up to July 5, 1928, concerning the sale of the McKeon properties to the Italo were between myself, as representative and owner of the McKeon properties, and Mr. Wilkes, as a representative of the Italo Company, and several contracts had been drawn prior to July 5, 1928. It also involved some properties in the Midway field near Taft, which do not appear on this map. There were three parcels of land near Taft which went over to the Italo free of encumbrance.

Prior to the agreement of July 5, 1928, Wilkes and I had practically come to an agreement whereby the McKeon Company was to receive 3,500,000 shares of Italo stock and other considerations, but I do not believe that

(Testimony of R. S. McKeon)

was recorded in the minutes of the McKeon Company. That record in the minutes was made after July 5, 1928, to the best of my recollection, and was changed from 5,000,000 to 6,000,000. After I agreed to accept 3,500,000 shares and other consideration, no other properties of the McKeon Drilling Company were added to those to be transferred to the Italo. The same properties were transferred that I had agreed to accept in connection with the 3,500,000 shares consideration. The deal was not put through on the basis of 3,500,000 shares because as it was finally set up the corporation would owe $2,750,000 realized prior thereto; they were to have all other properties free and clear of indebtedness with the exception of a million dollars that they were to owe us, and all of the properties, or at least many of them, including the Graham-Loftus properties, were going to be in jeopardy until the $2,000,000 indebtedness which they had taken on in the purchase of the Graham-Loftus properties was paid. I was on the point of withdrawing from the deal under those arrangements, and after considerable further discussion Mr. Wilkes agreed if I would go through with the deal he would give me another million shares of stock. I knew that after my brothers and I went into the Italo, that the Italo would have additional assets there to make their stock good.

When the deal was concluded, Exhibit 44 was drawn up and executed, and is intended to describe all of the properties that would go over from the McKeon Drilling Company to the Italo. The exhibit was signed by myself on behalf of the McKeon Drilling Company, and by Alfred G. Wilkes on behalf of the Italo Company, and was at-

tested to by E. A. Thackaberry, Secretary of the McKeon Drilling Company, and Paul Masoni, Secretary of the Italo Petroleum Corporation of America.

After the execution of the agreement the next thing to be done would be to obtain the permit from the Corporation Department which would enable the Italo Corporation to issue the 4,500,000 shares, and the necessary steps were taken to secure that permit, which was granted August 9, 1928. Thereupon Italo undertook to deliver the consideration and the McKeons to transfer the properties. The consideration from the McKeon Drilling Company passed to the Italo Corporation on October 15, 1928, and we did everything that our contract provided for us to do on that date. All of the consideration from the Italo hadn't passed up to that time or up to this time, and they still owe us money on the contract. They owe us in excess of $400,000. I believe the 4,500,000 shares of Italo stock was delivered to the McKeon Drilling Company about October 26, 1928. The Italo Company also delivered the notes and paid some cash, and assumed the obligations which were subsequently paid.

On October 26, 1928, 4,500,000 shares of Italo Stock the McKeon Drilling Company was to receive was in the office of Spalding & Myers, and at that time was placed in escrow with Shingle, Brown & Company, at which time Exhibit 98 was executed. It is signed by myself and my two brothers. I do not believe that at that time John McKeon was an officer of the McKeon Drilling Company.

Exhibit 98 contains all of the instructions given on that date by myself or my brothers to Shingle-Brown with

respect to what they were to do with the 4,500,000 shares of stock, except the 60,000 units that went to the International Securities Corporation.

Subsequently from time to time the McKeon Drilling Company directed Shingle, Brown & Company how to dispose of that stock that was in their hands belonging to the McKeon Drilling Company. About 2,500,000 shares of that stock was turned over to John McKeon to do with as he pleased, which he did, and the McKeon Drilling Company got 2,000,000 shares out of the transaction and so set it up on their books. When the 2,500,000 shares of stock were turned over to Jack McKeon, he was told to use it for the benefit of Italo and for himself. I presume he did not turn it into the Italo Company because it was his idea that the way he did use it was more for the benefit of the Italo than if he turned it into the Italo. The Italo never got the stock. 125,000 shares went to Paul Masoni, the same amount to John Perata, and they were both connected with the Italo Company. They apparently gave John what he considered was services in exchange for that stock. I am sure they gave him nothing in the way of money. Their services were in connection with this project that he had in mind.

I hardly considered Westbrook as connected with the Italo. To my certain knowledge he never attended a directors' meeting. Westbrook got 50,000 shares of stock, consting of 25,000 shares of preferred and 25,000 shares of common. Maurice Myers got 125,000 shares. I do not know how much Siens received. Those people were all directors of the Italo Corporation.

(Testimony of R. S. McKeon)

The letters of instruction for distribution of the stock, dated December 22, 1928, which were signed by John McKeon were not written by me. The form of the letters was my brain child, where I directed that those shares of stock be delivered to the different parties for services in organizing and financing and promoting the interests of the Italo Petroleum Corporation. I do not know of my own knowledge whether Mr. Wilkes got any of that stock, or whether Shingle-Brown or any member of that firm did.

I do not know whether John McKeon acted in his own capacity as owner of the 2,500,000 shares or whether he acted as agent of the McKeon Drilling Company. He did the things that the records show, and whether he was the agent or whether he was acting for himself or what it is, I am not competent to say. I considered that the McKeon Drilling Company parted with title to the 2,500,000 shares of stock when it was turned over to John and he was told to use it as his own. I considered that the McKeon Drilling Company and myself were through with that 2,500,000 shares of stock. I was not satisfied with the consideration that we received for our properties, when we accepted the 2,000,000 shares of stock, $500,000 cash to be paid, and the notes and obligations. I was to some extent dissatisfied. I was dissatisfied with the fact that Jack got himself into quite a financial hole by endorsing the paper of the Italo to the extent of $600,000, and it was that fact more than anything else that caused me to finally close up the deal and accept the four and a half million, and that fact caused me to agree to give Jack the 2,500,000 shares so that he could help himself out of that

(Testimony of R. S. McKeon)

hole. I had no further claims on the 2,500,000 shares, and I have never claimed anything of it or received a penny, directly or indirectly or otherwise for the 2,500,000 shares. That did not mean that that 2,500,000 shares was to be Jack's proportion of the consideration for our properties. He would still be interested with the rest of us in the 2,000,000 shares and the other considerations.

Q I show you a Western Union telegram under date of April 23, 1929, and ask you if you have seen that before.

A I seem to remember that telegram, yes.

Q To whom is it directed?

A To myself.

Q And by whom is it signed?

A By John McKeon.

MR. WHARTON: I offer the telegram just identified in evidence.

MR. WOOD: If the Court please, may I ask the witness some general questions here?

THE COURT: Oh, I don't know. It is a telegram actually received, isn't it?

MR. WOOD: Now, if the Court please, if counsel agree that it should be entered—

THE COURT: Why waste time for a thing like that, Mr. Wood? Mr. McKeon, did you receive that telegram?

A I believe I did.

Q Well, did you or did you not?

A Well, it is a number of years ago. I recall a similar telegram.

Q Oh, never mind what you recall.

A Well, I will say that I did.

(Testimony of R. S. McKeon)

THE COURT: All right; that is sensible on your part, let me tell you. Now, then, gentlemen, there is nothing further to that, is there?

MR. WOOD: I wish to make a motion at this time following some general questions of Mr. McKeon, a motion to suppress this evidence, if I may be allowed so to do.

THE COURT: Motion denied. Proceed with the examination.

MR. WOOD: Exception.

THE CLERK: Government's Exhibit 343.

Exhibit 343 is in substance as follows:

Telegram dated April 23, 1929 to R. S. McKeon, San Francisco from John McKeon in New York:

"Stock put up with Dabney note was ours but with understanding with Wilkes that enought promotion stock would be sold in meantime to pay note in event deal did not go through. I was to receive one-third Graham-Loftus commission but presumed it had not been paid. Situation has not changed since Friday but will positively know by end of week if not definitely assured by that time will leave for home. Feel justified in believing have a good chance as ever of deal going over. Advise after your conference with Shingle your reaction and also if Graham-Loftus commission was paid, who to and when."

I do not know of my own knowledge whether John got that commission. The only thing I know about who did get the commission is what is shown by the receipts in evidence here, that it was paid to other men.

(Testimony of R. S. McKeon)

Exhibit 166, the certificate in the name of the McKeon Drilling Company, Inc., for 3,139,500 shares of the common stock, is endorsed by John McKeon. I do not believe he was an officer of the McKeon Drilling Company, at that time, but the McKeon Drilling Company recognized his signature and considered that as a transfer of the stock. The same is true of the certificate for 300,000 shares of preferred stock, which is signed by John McKeon. I believe I sent the original of this telegram which is Exhibit 344, and which is in substance as follows:

Copy of telegram to John McKeon, New York City, from R. S. McKeon, as follows:

"Unable to close escrow with Shingle due to fact he has several instructions signed by you of which we had no record among which was authority to deliver preferred stock to Alf. Had figured on keeping preferred stock to come out even on deal. We have left in escrow only 30,000 shares of common which is now selling for seven dollars. Believe it advisable you call off deal and return at once as things in desperate condition here. Have not received full subscription on 300,000 yet and looks doubtful if we will receive it."

The Alf referred to in the telegram is Alf Wilkes, and the 30,000 shares of common stock referred to is the new stock, which would be the equivalent of 300,000 shares of the old stock, The new stock was then selling for $7.00 per share. The 300,000 referred to in the telgram was the loan that I was trying to raise among the directors to loan to the Italo.

(Testimony of R. S. McKeon)

I received this telegram about the date it bears, from John McKeon.

Received in evidence and marked Exhibit 345, and is in substance as follows:

Dated April 19, 1929 to R. S. McKeon from John McKeon.

"Brown claims to know nothing as to how escrow stock was handled but admits it has been distributed. Go to San Francisco and demand from Shingle numbers and denominations of all certificates released from escrow and to whom it went. This stock was all in our name and has to be accounted for by us, therefore we have full right to know where it went. Would not start any unnecessary fight with Shingle as I am not sure they were in on deal. Am satisfied will secure necessary finances for deal as all parties working in good faith and insist on me staying here until proposition is worked out. Believe will have something definite by middle of next week. Going out of town until late Sunday night as nothing can be done until Monday."

In December, 1928, the deal with the Italo for the assets of the McKeon Drilling Company had been completed, and I was at that time acting for the Italo people, and at the time that I and John directed these various certificates to be given out to the directors and officers of the Italo Petroleum Corporation the stock was in escrow and could not be released until ninety days after October 26, 1928. The stock could be delivered before the termination of the 90-day escrow by agreement be-

(Testimony of R. S. McKeon)

tween the McKeon Drilling Company and Shingle, Brown & Company, as provided for in Exhibit 98. At the time John and I directed the distribution of these various shares and units of stock to Perata, Masoni, Myers, Westbrook, Siens and Shingle-Brown, we did not inform the stockholders of the Italo Petroleum Corporation that that was what we proposed to do, and never advised the stockholders of the Italo Corporation that that stock had been so distributed.

In January, 1930, the Italo Company owed to the McKeon Drilling Company between $350,000 and $400,000, and at that time I was a stockholder in the McKeon Drilling Company, and traded my interest in that company for the $350,0000 to $400,000 that the Italo owed the company. After that time I had no interest in the McKeon Drilling Company and had the money coming from the Italo Petroleum Corporation. Prior to that time there had been no division made of the consideration that the Italo Petroleum Corporation of America had paid to the McKeon Drilling Company. I think that about all I got out of the deal was the money owing from the Italo Company to the McKeon Drilling Company, amounting to about $350,000 to $400,000, and I have not received that yet.

REDIRECT EXAMINATION

With reference to Exhibit 344, where I say, "Unable to close escrow with Shingle," I meant with Shingle-Brown. The language, "Due to the fact he has several instructions signed by you for which we have no record," refers to when I went to San Francisco to close the escrow

and found a number of instructions from John that the McKeon Drilling Company had no record of in their files here in Los Angeles. The language "Among which was authority to deliver preferred stock to Alf" means that among the instructions were those to deliver certain preferred stock to Alfred G. Wilkes. The language "Had figured on keeping preferred stock to come out even on deal" refers to the fact that I found on my arrival there that they had put up a million shares of McKeon Drilling Company stock, that is, of the 2,000,000 shares of the Italo stock which belonged to the McKeon Drilling Company that we had agreed to retain as our own property to secure a note of John McKeon to Dabney for two hundred fifty thousand, as an option on this property that Jack had an option on. It was my understanding that the million was coming out of the two and a half million shares that Jack had and many of us referred to as promotion stock, meaning stock that he was using in promoting this New York deal. I figured on taking from that escrow the preferred stock to make the McKeon Drilling Company whole on this stock that had been put up to Dabney.

The language "We have left in escrow only 30,000 shares of common, which is now selling for $7.00," means that there were 30,000 shares of the new stock, that had been selling that day on the market at $7.00 a share.

By the language "Believe it advisable you call off deal and return at once as things in desperate condition here," I meant that I thought it advisable for him to call off his New York negotiations and return here because the affairs

(Testimony of R. S. McKeon)

of the Italo were in a bad condition. They were short of money.

Then I said, "Have not received the full subscriptions on $300,000 yet and looks doubtful if we will receive it." That was the $300,000 loan for the Italo Company. The Italo Company was badly in need of money and I meant to ask Jack by this telegram to return here as the Italo situation was in a bad shape from a financial standpoint, and to come back and see what he could do to help the Italo get on its feet again. That is all I meant by this telegram.

The $300,000 loan referred to was the pool loan that was borrowed from the various directors and Shingle-Brown.

The occasion that I referred to of finding the stock in different condition than I expected to was the occasion I referred to in my testimony when I had a heated conversation with Mr. Shingle.

(Examination by Mr. Wood:) The last payment to the Graham-Loftus people was made about September 20, 1929. The payments ran over a year. The $2,000,000 was divided into twelve equal payments and the Italo made all those payments on the dates due. We borrowed a part of the money to make the last payment from the Richfield Oil Company, with the understanding that they could reimburse themselves from the oil they were obtaining from the Graham-Loftus properties. John McKeon arranged the loan, but I don't think that he guaranteed the payment.

(Testimony of William C. McDuffie—John J. Doyle)

WILLIAM C. McDUFFIE,

a witness on behalf of the defendants McKeon, testified under oath as follows:

I have lived in California 46 years, and have been in the oil business. For a number of years I was head of the production department for the Shell Oil Company throughout the entire world. I am now receiver of the Richfield Oil Company under appointment of the United States District Court for the Southern District of California. I have had business relations with John McKeon quite extensively. I have known him since about 1912. I have always found Mr. McKeon to be honorable and upright in his dealings with me, and I have used him a great deal in drilling contract wells. During my business relations with Mr. McKeon I became familiar with his general reputation for truth, honesty and integrity in the community in which he lives, and so far as I have ever known that reputation has been excellent. I would believe John McKeon under oath.

JOHN J. DOYLE,

a witness on behalf of the defendants McKeon, testified under oath as follows:

I am a native son of California, and have lived here all my life. I am in the oil producing business and have known John McKeon since 1920 and Robert and Raleigh McKeon the same period of time. I have had many business relations with them and am familiar with the

(Testimony of George W. Walker—G. E. O'Donnell)

reputation of John McKeon for truth, honesty and integrity in the community in which he lives. That reputation is very good, far above the average. The same is true as to Robert McKeon and Raleigh McKeon. I would believe them under oath.

GEORGE W. WALKER,

a witness on behalf of the defendants McKeon, testified under oath as follows:

I have lived in Los Angeles forty years, and am chairman of the executive committee of the Citizens National Bank. I have been an officer of the Citizens National Bank for twenty years, and had business relations with the defendant John McKeon. I have met Robert McKeon. I have had an opportunity to know John McKeon's general reputation for integrity and honesty in the community in which he lives, and it is excellent.

The general reputation of Robert McKeon is always considered good. I have never heard anything against him. The same with Raleigh McKeon. I would believe John McKeon, Robert McKeon and Raleigh McKeon under oath. .

G. E. O'DONNELL,

a witness on behalf of the defendants McKeon, testified under oath as follows:

I have lived in Los Angeles about forty years, and been in the oil business. I have known John McKeon about twenty years, and Robert McKeon about thirteen or fourteen years, and Raleigh McKeon about the same length of time. I have had quite a few business relations with

(Testimony of John McKeon)

the McKeon brothers and have had an opportunity to know their general reputation for truth, veracity, honesty and integrity in the community in which they live. That reputation is very good. I would believe any of the McKeon boys under oath.

JOHN McKEON,

a witness on his own behalf, testified under oath as follows:

I have lived in Los Angeles for fifteen years, and prior to that lived in the Midway at Taft, California. I started in the oil business in 1911 in the Taft-Midway field at the instance of Mr. Wilkes, and went to work on the properties that he then controlled. I worked as a laborer, pick and shovel and whatever was to be done. I worked for Wilkes and his associates from 1911 to 1918. Mr. Wilkes had organized the Mays Oil Company when I went to work for him, and after that he organized the California Amalgamated Company, the Head Drilling Company and the United Western Oil Company. I worked for all of those companies in all capacities, from common laborer, tool dresser, driller, foreman, superintendent, and finally had charge of all the operations of all the different companies. At that time we used the standard tool drill and a drilling crew consisted of a tool dresser and the drillers. In the development of the oil business we had begun using the rotary system of drilling, and had accomplished a great deal in the mechanics of well drilling. I was one of the early operators of the rotary drill and had a good deal to do with the development of the equipment. My opinions were sought in con-

(Testimony of John McKeon)

nection with the development of this rotary drill by the manufacturers, the different machine companies looked to the field organizations to get the ideas and work out the better patterns of machinery to use, and the Head Drilling Company developed into one of the biggest operators in the State, and therefore they were looked to a great deal by the manufacturers for advice, and in that way I became very familiar with the new machines that were made. The Head Drilling Company was strictly a contracting company, drilling wells by contract for the producers. They started in a small way and soon developed to where they were drilling all the rotary wells that were being drilled in the State excepting those drilled by the Union and the Standard Oil Companies. Those companies never contracted their work. We did all the work for the major companies for a period of four or five years.

I was only an employee in the Head Drilling Company. About 1918 Mr. Wilkes organized a company known as the Commonwealth of America, in which he was associated with some bankers in New York, and they consolidated the properties of the United Western Oil Company, the Head Drilling Company, and several other companies, one known as the Western Union, a very big company, and that was soon absorbed by a company which was afterwards known as the Union Oil Company of Delaware. That was organized by Mr. Wilkes, and that company today is the Sehll Union of California.

Mr. Wilkes raised $50,000,000 for the company and bought properties in the State, including the Columbia Oil

Company, which was a very substantial company, and also accumulated about thirty per cent of the stock of the Union Oil Company of California. Their operations were very extensive in this State, and I had charge of all the field work. I stayed with that company two years.

During that time my relations with Mr. Wilkes were very intimate. I worked directly under him and with him and had complete charge of all the development of the State which they were carrying on at that time, a very big program. At that time I had confidence in Mr. Wilkes' integrity and ability. At the time Mr. Wilkes organized the Union Oil Company of Delaware, or the Commonwealth, about 1918, he gave me a large block of stock in that company, that is, in the Commonwealth Company, which was changed into the Union Oil Company of Delaware. I left the company after two years of operations and sold the stock that Wilkes gave me for $65,000, and was granted $200,000 credit by the Union Tool Company and started in the contracting business for myself in 1920.

At that time my brothers had no interest in the business. I ran the company. My brothers at that time were working for the Ohio Oil Company in Wyoming. They afterwards came down and went to work for me. I ran the company as an individual until late in 1923, at which time I incorporated as the McKeon Drilling Company. The three years previous had been very successful and I had assets of about $2,000,000, and when I incorporated the company I gave Bob thirty per cent, Raleigh thirty per-cent, and my younger brother Paul ten per cent, and re-

(Testimony of John McKeon)

tained thirty per cent myself. We then operated the company as the McKeon Drilling Company, Inc., up until the time we consolidated with Italo.

In the summer of 1926 we had drifted from the contracting business into the production business and quit contracting, and we were drilling wells on our own account. In 1926 we put part of our production into the Richfield Oil Company, and I went over there and took charge of their production and had charge of it until 1929, when I left to join the Italo. In the meantime my brothers ran our company and carried it on in the usual manner that we had always carried it on.

Although I am accused in the indictment of having participated in the incorporation of a company known as the Italo-American Oil Company in 1924, that accusation is not true. I never heard of that company until late in 1927, at which time Mr. Wilkes came to me and told me he was contemplating making a connection with that company. He told me he expected to go in with the company and develop it, if possible, and showed me a list of the assets, and wanted my opinion on what the values were. I gave that the best I could. The next I heard of the company was in the spring of 1928. I did not become connected with the Italo-American Company at all; I never had any connection with it, either as a stockholder, director or officer or creditor.

In the spring of 1928 Mr. Wilkes had made some changes in the corporation and planned an extensive program, and came to me to see if I would not put in, that is, if the McKeon brothers would not put in their prop-

erties into a consolidation that he then had in mind. Mr. Wilkes prior to that time asked me about the value of the Brownmoor properties.

Mr. Wilkes explained to me, when he finally came to me to make a proposition to get our properties to go into the consolidation, he showed me a list of properties that he had been figuring on and expected to put together, and wanted our properties to go in with that group of properties, and I told him the day he called on me that I felt his plan was too ambitious. I did not think it would be possible for him to raise the necessary finances to put the properties together, and rather discouraged him on it; but he assured me that he was sure he could do that, and in a day or so later he brought Mr. Vincent back to my office with him, he being the fiscal agent of the company, and Vincent assured me that if he could have a company with the basis of the properties that they were contemplating and properly managed, that he would have no trouble in raising any amount of money. He called my attention to the fact that just recently he had raised three or four hundred thousand dollars in a week or ten days. I was still not convinced that he could do it, but Mr. Wilkes said that he intended to go to New York and make connections with his old people there and expected to get part of the money in New York. With that plan in mind and with Vincent's assurance, I felt they could finance their operations.

I believed what they told me, and I told them if they could make a satisfactory deal to my brother Bob I would not object or oppose it. I was familiar with the properties that they proposed to put into the merger. I

(Testimony of John McKeon)

was very familiar with them and pretty well familiar with every property in the State. The Richfield had been acquiring a lot of properties, and we had our scout and geological department, who kept us advised on every property in the State. In fact, we had properties in every field and knew the condition of pretty nearly everybody's properties. All large companies do that.

The properties which Wilkes had in mind and which were afterwards put into the consolidation was a sound oil operation. They had between 13,000 and 15,000 barrels per day production, a lot of undeveloped land, a lot of very good potential land, and to my mind it was the best basis that Wilkes had ever started out on, and I had seen him all these years start on projects, and each one of them had worked out to an ultimate success, in fact to a very good success in three different instances; so I had no reason to believe but what this would be a success, and it would have been a success had not the conditions prevailed that have prevailed in the meantime. Every condition and every circumstance that could arise and interfere with it did arise. The Italo properties today are still a sound basis and worth the full capitalization at which they are capitalized, their intrinsic value.

After this conversation with Mr. Wilkes, my brothers and myself and Mr. Wilkes had a conference a few days later. By my brothers I mean Raleigh and Bob. This conference was in Mr. Wilkes' room at the Biltmore Hotel. It was near the first of June, 1928. We discussed the feasibility of going into the consolidation, whether it would be a feasible plan for us to do it or not. We were

in a very good position at that time, and had a very splendid income and unlimited credit, and we were a going concern, probably making us net above the cost better than $1,000,000 a year, and our then present opportunities were better than they had been in a long time. So it was pretty hard for us to decide on changing that and going into something more or less speculative. After two or three hours talk we left there and had a little conversation together.

In this conversation with Wilkes nothing was said concerning the condition of the company, as to its indebtedness if the merger or plan were worked out. We left there with the idea that this merger was going to be put together without very much indebtedness. It developed later in our dealings that the debts were more than we had expected they would be, so that made it a little different so far as our feeling about the deal was concerned.

At the time I left the meeting I was under the impression that the properties were going in with little or no debts. Bob, Raleigh and I had a meeting that same night in the lobby of the Biltmore Hotel, and we concluded that if we could get what was the proper kind of a deal we would go ahead and make it. So we commissioned Bob to do the trading and make the deal, and that was done. I didn't negotiate any further on the properties, but, of course, was advised by Bob all the time of what was going on.

There was nothing whatsoever said to me or in my presence in respect to the disposition of whatever stock or consideration was paid to us by the Italo for these

(Testimony of John McKeon)

properties. There were no strings on that stock. I did not enter into any agreement with anybody that any part of that stock should be rebated to anybody else or should not become the property of the McKeon Drilling Company. If I had had any idea that I would later be called upon to use part of the consideration which we were to get for purposes other than the purposes of the McKeon Drilling Company, we wouldn't have considered the deal for a minute. We were putting our properties in, in my opinion, for less than their worth, and putting in clean, nice properties in a clean, nice proposition. If we had thought there would be any difficulties in the future, we wouldn't have considered the deal on any basis.

At the time we agreed to put our properties in, it was our purpose to go into an oil producing proposition and we never gave a thought to selling stock. We expected to make our money out of the production of oil.

After the conversation between Bob, Raleigh and myself, we agreed after reviewing the properties that were going into the consolidation that if we went in we would have to have a certain amount of cash and approximately one-third of the stock of the company. We felt that our properties and our organization was worth one-third of the other properties that were being consolidated. We realized that we were giving up our identity in the oil business and were giving up the idea of making profits for ourselves; that our efforts would have to be directed to that company entirely, and, also, if the company ever got into difficulties, that we would have to be a part at least of the people that would carry it through. With all

(Testimony of John McKeon)

those things in our minds, we concluded we would have to have at least one-third of the capital stock of the company. We did not consider the capital stock that we were getting as the equivalent of cash at the par value of that stock. We knew that it was stock; that it was necessarily a speculative commodity. We knew that the company had just sold six million shares at the rate of about 60 cents a share to the syndicate, and that that money was used to buy properties comparable to ours, and that cash was paid for them. We couldn't be expected to figure that our stock was worth more than they were willing to take for it in cash. We knew it was not the equivalent of cash.

After we agreed to make this deal I left Bob to work out the deal and final consideration and details. Of course, I was advised at all times before any definite arrangement was made, but I left it to him to work out the details and all the negotiations on the deal.

I went up to San Francisco and the deal was all settled, and it was ratified by the board of directors. I went before the board of directors at that time and did not conceal from the board any facts which were then facts, or any agreements which had then been made. I stated fairly to the board of directors what those properties were and my judgment concerning them. There were no members of the board of directors at that time other than Bob who I dominated or controlled in any way. I did not promise any one or more of the directors any reward or compensation or commission, in the event the deal was consummated, and did not suggest anything of that kind

(Testimony of John McKeon)

to anybody, and did not authorize anybody else to make any such proposition at my suggestion or on behalf of the McKeon Drilling Company.

At that time with my knowledge of the properties and of the oil business and of the Italo, I thought the transaction that I was going into, not only as to the McKeon properties but as to all of those properties, was just and reasonable and a very fine deal. It did not occur to me that there was anything in it as a basis of a fraud on anybody.

After the transaction was made I paid no further attention to it. I was very busy running my own business until about September 18th or 20th, 1928. Mr. Wilkes had left shortly after that deal was closed and the other deals closed, for New York to make his financial arrangements. Mr. Vincent was supposed to raise the money necessary to meet the early payments on the different properties, and I imagined everything was going along all right, not being in touch with him, until about the 18th of September, when Mr. Wilkes came back from New York and came to my office immediately to see me and said that things were in a very bad condition, that he hadn't made any immediate arrangements in New York, that Vincent apparently had not raised any money, that there was $600,000 due the next day on the Graham-Loftus properties, and I believe they had already paid the Graham-Loftus $400,000, and that he was satisfied it would be impossible to get any extensions on the Graham-Loftus account because they had $400,000 and had brought in a 5000-barrel well in the meantime, and that if

he weren't able to make his payments he would lose *thoese* properties, and also the $400,000, and that would proably stop him in his plan altogether, and that the project would become a failure. I believe he said that up to that time the syndicate had expended close to $1,000,000 for the benefit of this Italo consolidation.

Prior to that time I had subscribed $100,000 to the syndicate, and had induced others to subscribe to it, and I think 75 per cent of the money that went into the syndicate went in on my account through my friends. Wilkes said, "Unless something can be done immediately, we are in a state of total collapse. The syndicate will lose its money and the Italo will lose its property, and we are right up against a gigantic failure. That was about September 18 or 19, 1928. So I said, "I will make an effort to get the $600,000 necessary to hold the Graham-Loftus properties."

I believed it was a wise thing to hold those properties. Mr. Wilkes felt that if this one hump could be gotten over and that big payment made, that the financial program would be gotten under way and from there on we could handle the situation. However, if we couldn't handle that he didn't think there was any use of going further with that particular financial set-up. So I called up my old friend, Mr. William Lacy, who had been my friend for years; he had been in a great many oil deals with me, the two of us together, and he had already put $100,000 in the syndicate. I called Mr. Lacy and Fred Gordon together, and went to the Farmers & Merchants Bank and made arrangements to borrow $600,000. Mr. Lacy gave his note for $300,000, and I signed the note.

(Testimony of John McKeon)

Fred Shingle or Horace Brown was with us, and the bank wanted 2,000,000 shares of stock security on the other note. Mr. Shingle didn't feel that he had authority to put the stock up, so I agreed with Mr. Shingle that our properties were going into the consolidation, and that if we had any trouble on that stock I would reimburse him from the McKeon Drilling Company stock for the stock he was putting up out of the syndicate, and he put it up. That was the first agreement that I ever had as to the distribution of any of the McKeon Drilling Company stock.

At that time I believed that the agreement I made was to the best interests of the Italo Company, and to the best interests of everybody concerned—the Italo Company, myself, the syndicate and everybody else. It couldn't help one without helping the other. So that $600,000 was secured. Mr. Wilkes then went to San Francisco to check up with Vincent.

The $600,000 was paid to the Graham-Loftus people on the 20th of September; it had to be paid on time. I believe I had to get the bank to keep its doors open a little while so we could get in with the money.

I had known Mr. Graham for years and had drilled several wells for him. I had a conversation with him in connection with the transaction by which the Italo acquired the Graham-Loftus properties. Mr. Wilkes had done the negotiating with Mr. Graham, and he asked me to go over and talk with Mr. Graham and find out if we couldn't get him to accept some of the Italo stock. all or part of the payment in Italo stock. I did that. I

went over and asked Mr. Graham to accept half of his money in cash and half in Italo stock. He said he wouldn't take any part of it in Italo stock at all, that he wouldn't give his properties for the whole capitalization of the Italo Oil Company; that he wanted to sell for cash and that he would consider nothing but cash; but after the conference there I had with him, he did agree to come down from three and a half million to three million.

A man came into the Richfield one time and wanted to sell the Graham properties to the Richfield. Mr. Graham and Mr. Loftus were both very anxious to sell their properties. They were both over seventy and had built up this fine property and wanted to sell it at its peak. They were both as keen oil men as ever lived. A man brought it in and wanted to sell it to the Richfield, and I told him the Richfield could not handle it, but that this Italo thing was on and they might be able to handle it over there. I sent him to Mr. Wilkes. I think he met Mr. Siens instead of Mr. Wilkes, and that is where the negotiations started on the Graham-Loftus properties.

I didn't have any understanding with this man respecting commissions in event commissions were paid, but he told me that if he made the deal with those people he would give me a third of the commission, and that is all that was ever said about. it.

After the $600,000 was borrowed and Wilkes went up to see Vincent, Wilkes returned in a few days and said that Vincent was not going to be able to fulfill his contract, that he had not sold any stock or at least had no cash available, and that the 15th of October was going

(Testimony of John McKeon)

to find us in the same condition that the 15th of September had, and that some drastic changes had to be made. He got in some trouble with Vincent and said that at this time Vincent was threatening. I believe Wilkes was negotiating then with Shingle-Brown to take over the financing. Vincent wouldn't agree to that and was threatening a lawsuit, and we all realized that a lawsuit and injunction at that time would completely break down the financing program and kill it entirely. No brokers would come in under those conditions and no one would want to buy stock under those conditions. So something therefore had to be done with Vincent. I would say that was probably about October 1st, 1928.

Wilkes told me that the company hadn't any way in the world of settling with Vincent. They had no stock, and if I didn't come to the rescue of the company at that time he was again in a very bad hole. I said of course we were all going in the hole, so I didn't give Mr. Wilkes any decision but called my brothers over to talk the matter over with them.

Of course they were very much against my going any further than I had gone, but I told them, "Now, we have the choice of two things;" that our syndicate members had in a million two hundred thousand dollars at that time; they were all friends of ours and had come in particularly on account of the fact that we were in the consolidation, and we had the choice of pulling out our properties, and up to that time I think we had received $150,000 in cash and had the right to take that $150,000 out. We had the right to withdraw that and let our friends in the syndicate lose all of their money and let

the company slide, and that was just the position we found ourselves in. The other alternative we had was to put our efforts behind the company and go with it and start from there and sink or swim with the company. I also told them that in by opinion, if we could get this company under way and going, it would develop into one of the best operations in the State, and drew their attention to the undeveloped land and assets the company had.

After consideration they agreed I should go ahead and make the settlement with Vincent and use whatever stock I needed. At that time we didn't decide what it was that was necessary to handle this company. It was running in my mind that we would take care of Vincent and take care of another crowd of brokers that would come in to make a success of it. I told Wilkes to go ahead and make whatever deal he had to to get Vincent out of the picture. Wilkes went back with my authority to make the deal, and he came down to Los Angeles a few days after with Shingle and Brown, who at that time were very reputable brokers in San Francisco, and who had been very instrumental in raising a great deal of money raised for the Richfield Oil Company, in which connection I had known them, and I knew that if they started to raise the money it would be raised. They had associated themselves with three or four other big, strong firms.

They came down particularly to see me and look at the properties. We had a meeting and they made the proposition that if I would become president of the com-

(Testimony of John McKeon)

pany and handle the physical end of the business, they would guarantee the financing of the syndicate. I told them it would be impossible for me at that time to leave the Richfield on short notice and take the presidency, but I thought my friend Mr. Lacy could possibly be induced to take it; that if he could he would be a better man than myself. They didn't know Mr. Lacy, but I went that noon and spent two hours with him talking about the proposition, taking it up with him. Lacy said no, he couldn't consider it, that he had so many interests then that he didn't want to take on any more responsibilities. It took me a good while to convince him. I told him, "We are in this position: you have $100,000 in the syndicate and have signed $300,000 in notes. We have on the one hand a splendid block of properties, as solid as can be. On the other hand, we have a completely broken down financial structure, and if both of us don't get behind this company it looks like it will go on the rocks. If you do come in, there isn't any reason we can't make it a fine operating company."

Lacy finally agreed if I would come into the company with him and do the practical work of handling the fields, he would take the presidency. So I told him I would do that as soon as I could get away from the Richfield, and I came back and reported to the brokers. At that time I was vice-president in charge of production for the Richfield and was getting about $100,000 a year.

I reported the result of my visit to the brokers, and they said they wanted two days to look up Mr. Lacy and look at the properties. They were taken to all of the properties in this vicinity and were highly pleased with

their reports on Mr. Lacy, and it was agreed that they would take over the financing of the company, and they did. Mr. Lacy became president, and there was a stipulation on his part that if he went in there he wanted to put on five or six members on the board, friends of his, and all oil men. He did put those men on the board of directors on October 16, 1928, and they were Mr. Hugh Stewart, who had been manager of the Farmers & Merchants Bank for twenty years, Mr. Frank B. Chapin, Fred Keeler, Bob McLachlen, Mr. McNear, and Maurice Myers. Fred Gordon was Lacy's brother-in-law and was a practical oil man, and was already a director of the company. Gordon had been connected with the California Petroleum Company, which is now the Texas Company, and had been in charge of their land department for several years.

At the meeting of the directors in San Francisco the next day, which I attended, Mr. Lacy was elected president and Perata resigned, and all of those directors I spoke of were put on the board, and the other directors resigned to make room for them. I did not go on the board of directors of the Italo Corporation and have never been an officer or director of that company.

Shortly prior to October 16, 1928, at the time I told Wilkes to settle with Vincent, I also told him to use what stock was necessary to get stronger financial firms in to handle the situation. I told him I would go on that as far as we had to go to get that support. That is always usual in every financing arrangement of that kind, that the financiers who furnish the money get the stock bonus. I found that out in New York and in every deal I have been in. There is usually a demand made

by the bankers who furnish the money that they make their profit out of the common stock, which in the oil business is considered the speculative end of the stock structure.

My next move was this: Mr. Lacy took active charge of the company at once, and a big drilling program was started. A large drilling program was started, running 12 to 14 strings of tools. That requires a lot of money. The properties that were taken into the consolidation were taken in with an indebtedness of $2,750,000, and the monthly payments on that were running about $50,000 a month. That together with the cost of development being carried on, was running us ahead of the company's income, which at that time was about $350,000. It soon became apparent that the company was under-financed, and although the company had secured a lot of fine properties, it hadn't made any arrangements for working capital, and I might say the drilling program that was started at that time was not as successful as it might be. That often happens. There was a great deal of disappointment in some work being done.

In the drilling of oil wells there are numerous hazards, even where oil is known to exist. A well has to be finished just right or no bad luck encountered, or not much bad luck encountered, or you don't get a well, especially working at the depth we were working at in those days.

In my judgment that program was a sound program. It was being carried out for the company, getting the properties together, and undeveloped lands and develop-

ing them. At that time the oil business was quite at its height. There was a great demand for oil and a pretty fair price for oil, and everybody thought the price of oil was going up. In fact, the marketing companies were making every effort to secure every contract on oil that they could get.

I considered that the McKeon Drilling Company owned that stock I agreed to distribute. The Drilling Company gave real value for the stock, all it was worth, and nobody had anything to do with it. In my judgment at that time the stockholders of the Italo Petroleum Corporation of America had no remaining interest in that stock. They had value received for the stock they had given and had absolutely no interest in it whatever. I figured it was our property to do with as we pleased.

On October 16th, 1928, I had not agreed to distribute any more of the stock of the Italo belonging to the McKeon Drilling Company for any purposes other than the McKeon Drilling Company's own purposes. When Mr. Lacy came into the company I gave my resignation to the Richfield, to take effect December 1st. They prevailed upon me to stay to January 1st to get matters straightened out. They didn't want me to leave and would have been glad if I had stayed, and offered me an inducement of increase in pay if I would stay, but I couldn't stay. I had the proposition started that was rapidly falling on my shoulders, and had agreed with Mr. Lacy that I would come into the company. So in the meantime the bankers Mr. Wilkes had dealt with in New York came to California and looked things over and spent a good deal of time looking over the properties and the financial

(Testimony of John McKeon)

set-up, and agreed if other properties could be added to the group they would furnish $15,000,000 on a certain basis that they outlined, providing other properties could be added to the Italo properties that would return the investment. The fact that Mr. Lacy was going to continue with the company and that I was going to give it the rest of my time—I felt it should be made a bigger company, and we felt that we should have or would have to have some refinancing of one kind or another, so Mr. Wilkes, whom I depended upon entirely in the matter of that kind, I wouldn't have gone into any financial or consolidation program without the assistance of Mr. Wilkes, in whose ability and integrity I had confidence, and with whom I had been for twenty years, and I felt he was the most capable and successful organizer and financier I had known of in the country, and I don't think there is any other man I would have put as much behind as I would have put behind Mr. Wilkes. Therefore I depended upon Mr. Wilkes, so I told him about this time if we would make a bigger company, bigger operations, and get more money, providing he would stay with me and hold together the members of this company, which would be necessary, that we would attempt to make the company much larger and put it on a sound basis. I also found out about October 15th, between then and November 15, 1928, that there was a great deal of dissatisfaction and factions arising in the company. We had elected Mr. Lacy president and moved the offices from San Francisco to Los Angeles.

The people in San Francisco, who were the Italian stockholders, and at that time I guess about 20 per cent of

the stock was owned by Italians, and the loyal fellows that had been with the company a long time had been pushed aside, and there was a fast growing dissatisfaction in the company that I knew would eventually probably work a great hardship on all of us. So I attempted to straighten that out. I told Mr. Perata and Mr. Masoni, who had been the founders of the company and had the absolute confidence of all their stockholders, that if they would continue with the company and give it the loyalty that they had always given it and work with me, that I would give them some of this stock. The stock that I was going to give them was my own property. That conversation with Perata and Masoni was early in December, or late in November. It was before I went to New York.

I talked to Mr. Masoni in Los Angeles and to Mr. Perata in San Francisco. I told Masoni at the Biltmore Hotel, when I ascertained that he was dissatisfied, substantially as I have stated. I told him we expected to go on and enlarge the company, and that we needed the support of our present stockholders, and of our present officers, and that we did not want any different factions coming up in the company. At that time there was a great deal of it; and if he would help straighten out those factions and work with me I would give him some stock.

About November 15th I saw Perata on the street in San Francisco and told him practically the same as I had told Masoni. Perata was very much upset about the fact that they were all being pushed out of the picture and I did not want them to feel that way. Perata told me that he felt that way about it. I told them of my

(Testimony of John McKeon)

future plans, of the plans that I was trying to work out, and that if they would help me clear through that I would be very willing to give him this stock. My conversations with Masoni and Perata in which I agreed to give them this stock had no connection whatsoever with the making of the deal whereby the McKeon Drilling Company sold its properties to the Italo. My conversations with them were several months after the deal was made, and it had nothing to do with it at all.

At that time I was working with Mr. Wilkes. He was the man I depended upon in working out our plans, more than anybody else. I told him that if he would give up his attention entirely to the Italo and turn that over to my brother Bob and Lacy, let them handle that, and go to work on this deal, that I would use what stock was necessary to put the properties together and finance the deal that we were then working on. It took a good deal of money to do that. In order to get this together we had to have positive options and deeds on our properties, and we took several properties over and paid substantial amounts on them.

I furnished all the money that was used in that attempted consolidation. There wasn't a dollar ever charged to the Italo on it, and it ran in all before I got through between four and five hundred thousand dollars, nearer five hundred thousand than four, I believe. We paid Mr. Dabney $250,000 for his option and a partial payment on his properties. That was paid in the form of a note, which I secured with 1,000,000 shares of Italo stock, which was part of the 4,500,000 shares of stock the prop-

erty of the McKeon Drilling Company. That was common stock. I never got any of that stock back.

In the deal I was able to hold the properties until away into next summer without further payments. I got extensions and I kept Dabney from selling any of the stock to reimburse himself, by giving him a mortgage on a very beautiful home I had, and I got further extensions by adding further security, and in the windup I lost the stock and lost the home and I paid Dabney, I think, fifty thousand in cash besides. The property that all of this money was paid on was the property that I was optioning for the purpose of carrying out the reorganization of Italo and the development of the so-called big company that was planned. The deal that we had worked out with the bankers in New York at first was that they were to furnish us $15,000,000, $10,000,000 of which was to be secured by a bond issue and $5,000,000 was to be secured by what they called debentures, which is a sort of preferred stock.

In putting up this money and property of mine I had no idea at all that I was attempting to defraud the stockholders of the Italo Corporation of America. I did not conceive that they owned any interest in this property that I put up, and there was not any question in my mind about who owned the stock.

With reference to the conversation that I had with Wilkes with respect to his leaving the Italo Company and giving his attention to the new deal, that conversation was held in Los Angeles, and I do not think anyone else was present. By that time the New York banking group had a representative in the field here and had concluded

(Testimony of John McKeon)

about what they could do. It was at that time that I told Wilkes to drop his connection with the Italo as it was in better hands than his own from the development standpoint, and to secure the properties that would be necessary to meet the New York requirements, that is, to help me secure them. We looked at a great many properties, and decided upon the Dabney and Johnson properties. That was a very big company and had a big production. We had an option on it for six million dollars in cash; it was a very good buy at that price. We had the properties of the Delaney Petroleum for one million and a half in cash, and we had the Jim O'Donnell properties that we were paying a million for. Those were the three groups of properties that were going in with the Italo properties.

The bankers were to furnish $15,000,000, $10,000,000 of which was to be a bond issue, and $5,000,000 to be raised from the sale of debentures, which were a sort of bond that were transferable into stock at a certain price, and it was to be a part of the agreement that the brokers on the coast would handle $5,000,000 of the bonds. We were paying Dabney six million, Delaney a million and a half, and a million to O'Donnell, making a total of eight and a half million. Out of the fifteen million it would take about two and a half million to pay the debts of Italo which were to be paid, and that would leave us five million dollars working capital, which capital would have been used in developing our undeveloped properties and carrying on our work, and had that deal been consummated, the Italo Company would have been a very splendid company and would have made money for everybody concerned. That would have left four and a half million for working

capital. The stock was all to go to the Italo stockholders excepting twelve and a half per cent, which went to the bankers who furnished the money.

Wilkes did a lot of the negotiations for the properties, and a lot of the dealings on them, with myself. He worked with me all the time. I furnished whatever security or money was necessary. When Wilkes started on the job he thought the money required to put the deal through would be furnished by myself, expecting of course that when the deal would be consummated my expenses and money would be returned, and they would have been had the deal ever been finished. If the deal had been consummated, the security I had put up for options and the money I paid on options would have been applied on the purchase price and I would have been reimbursed. I did not anticipate losing that money when I started in on that deal, nor losing my home.

I gave orders and directions to Shingle, Brown & Company, the escrow holders of the stock, to turn over stock to Mr. Wilkes. The orders are in evidence here. When that stock was needed and the money was needed for that stock in our transactions, it was delivered to Wilkes and sold on the market by him, and the money put into our transactions. I know where most of the money went.

I had nothing whatsoever to do with the original transaction between the Italo and the McKeon Company and the turning of the stock over to Wilkes had no connection with that. That was not in the form of a commission or a compensation to Wilkes for inducing the Italo to make the deal with the McKeon Company. As it turned out it was never used for his personal benefit.

(Testimony of John McKeon)

All the stock that went through my account or Mr. Siens' account was all for my account. I had had a good many dealings with Mr. Siens for several years.

Prior to getting into the Italo transaction I came into posession of some land in San Bernardino, in the city, vacant land in the business section, and I built a big business and office building and a hotel. That work was looked after and taken care of and worked out principally by Siens. Siens worked out the deal and handled the money and the project for me. That building and all was going on late in 1928 and early in 1929. That work had connection with the stock which was turned over by me or ordered turned over by me to Siens that went through Siens' account. That is the way I was financing part of that work down there.

I financed that work through the sale of stock which Siens handled, and those transactions are all set up in a special set of books that I have which are not in evidence. Those transactions by which stock or the proceeds from the sale of stock went into Siens' possession had no connection whatever with the making of the sale of the McKeon Drilling properties to the Italo. None of that money or stock was given to Siens in consideration of his influencing the making of that deal by the Italo Company. I had no understanding with him that he was to receive any of that stock, or anything else, at the time or about the time the transaction was made by which the Italo acquired the McKeon properties.

The stock given to Maurice Myers was not given to him in connection with this transaction. I didn't have anything to do with that, but it was handled by Bob McKeon.

(Testimony of John McKeon)

I know that the stock was given to Myers, and Bob said that we seemed to be pretty liberal with the stock and that he figured Maury Myers had worked about as hard and done as much for the company as anybody else, and as long as other people were getting the stock he insisted that Myers should have some, so I told him to give him what he thought he ought to have.

With reference to the charge in the indictment that I had some connection with and did organize or aid in the organization of the Italo Petroleum Corporation of America, I had nothing to do with that at all. I was not familiar with the details of it, and did not give any directions as to how it should be organized.

I had no connection with the turning over of the actual properties belonging to the Italo-American Corporation to the Italo Petroleum Corporation of America, or the issuance of the stock. The only transaction I ever had with the Italo was putting my own properties in. Prior to that I had no relationship with the company at all.

I had no relation to the $80,000 syndicate and received no part of the consideration that was paid to the syndicate members, and knew nothing about it.

I had nothing to do with the fixing of the price that the Brownmoor Oil Company was to receive for its properties, and never received any stock or any of the proceeds of the sale of the stock which was issued for the Brownmoor. My brothers had nothing to do with those transactions either.

When the application was made to the Corporation Commissioner for permission to distribute the stock that

(Testimony of John McKeon)

went into the treasury of the Brownmoor Corporation at the time its assets were turned over to the Italo. I had nothing at all to do with the making of that application, and had nothing to do with any of the Brownmoor deal. I had no information concerning it, and was never advised or told that there was anything irregular or dishonest in any of those transactions. It never came to my notice that those transactions were criticized as being fraudulent in any way.

When our properties were put into the Italo transaction I had not been advised or told and did not have any notice that there was any claim or assertion that there was any dishonesty connected with it or with the company or its plans or operation or distribution of its shares. There wasn't anything wrong with it. I did not know anything about going into an existing scheme or artifice to defaud anybody.

I went into the big syndicate, by which the syndicate acquired 3,000,000 units of stock for $3,500,000, and was a subscriber and subscribed $300,000 thereto. My first subscription was $100,000 in the latter part of July, and then I subscribed $100,000 in the name of Art Delaney, to whom I owed $100,000, and he agreed to accept the membership in the syndicate for the $100,000. I put the money into the syndicate because I believed it needed it. I subscribed another $100,000 in the name of Mr. Siens, who was doing a good deal of work getting members and getting money into the syndicate. It was at a time when we depended entirely on the syndicate to raise the money necessary, and I felt by putting a subscription in his name

(Testimony of John McKeon)

it would be an aid to him in inducing other people in putting money in.

When it came up to October 15th and our properties were to go into the company and we would not put them in without a $500,000 payment, it became necessary for me to accept two more memberships and two hundred thousand more in the syndicate to make it feasible to put the properties into the Italo Company, whereby the Italo Company would begin to get the benefits of the production, which at that time was 125,000 a month, but to complete the consolidation and get the thing going, our properties had to go in. For that reason I took the other two hundred thousand subscription, first, to get the properties in and get the thing completed, and, second, to make a profit or a loss, whichever it would turn out to be. I had no other connection with the syndicate.

When I made those syndicate subscriptions I did not believe or consider that in doing so I was working a detriment to the Italo Petroleum Corporation of America. I knew that the life of the Italo depended entirely on the syndicate, and I got a great many of my friends to subscribe to the syndicate.

With reference to Exhibit 297, line 36, which reads, "Bank of Italo. Escrow, Vincent & Company, market losses, 125,000 shares," that stock was not given to Vincent & Company by reason or virtue of any agreement which existed at the time the transaction was made by which the Italo Corporation acquired the McKeon Drilling Company property. It was not given for any influence that Vincent might have or use on the directors of the

(Testimony of John McKeon)

Italo to put that deal over. I had no understanding or agreement with Vincent or anybody else that Vincent was to receive that stock at the time or about the time the transaction was made between the Italo and the McKeon Company.

That stock was issued to or transferred or given by the McKeon Drilling Company to Vincent in the manner and for the consideration which I have already testified concerning. When I gave it I believed I was acting for the benefit of the Italo and everybody concerned with the whole transaction, and it was absolutely necessary to hold the thing together at that time. It could not have been done in any other way. Whatever loss was incurred or suffered by my giving that stock to Vincent was suffered by myself and the McKeon brothers.

Exhibit 297, line 35, reading, "E. Byron Siens, F. & M. Bank loan, 200,000 shares," refers to the Farmers & Merchants National Bank loan that I made. I got the benefit of that loan and that stock was used to secure that note. That 200,000 shares does not represent any compensation or contribution which I was making to any of the officers or directors of the Italo Corporation to induce them to defraud the stockholders of that corporation or to induce them to make the deal by which they acquired the McKeon properties. That arrangement had not been made and there was no agreement that it should be made at the time that transaction took place.

Exhibit 297, line 34, "Shingle, Brown & Company, 24,031 shares," I do not know what that represents. The same is true with reference to the rest of the items appearing on that exhibit.

(Testimony of John McKeon)

With reference to all of the items on Exhibit 297, commencing with line 16 and ending with line 36, the total being on line 37, none of those shares of stock which were used to give to any officer or director of the Italo Corporation of America represented any profit, secret or open, or any compensation or consideration for inducing the making of the deal by Italo, whereby they acquired the McKeon property, or for the purpose of getting them to vote for it in a directors' meeting, or to influence anybody else to do so. None of the items appearing on Exhibit 297 relative to the 1,000,000 shares of preferred stock were given, issued or distributed for any such purpose.

The disposition that we made of that stock by my brothers and myself was made in good faith, believing that it belonged to me, and without any advice, agreement or arrangement connected in any way with the sale of our properties to the Italo Petroleum Corporation of America.

Where stock appears to have gone to officers or directors of the company or to the brokers or fiscal agents of the company, I did not transfer that stock to them or either or any of them for the purpose of defrauding the company or its stockholders. Any loss that was suffered in connection with any of these transactions where I gave away or transferred for a consideration or not any of this stock was not charged back to the Italo Petroleum Corporation of America. The Italo Corporation suffered none of the detriment that resulted by reason of our having lost control or ownership of that stock, and my brothers and myself sustained that loss and bore it ourselves. The Italo Petroleum Corporation acquired all of the McKeon prop-

(Testimony of John McKeon)

erties that were involved in this contract and some other properties, and they had and have title to all of it.

With reference to Exhibit 345, that is a telegram from me to Robert S. McKeon. At that time I was in New York and Mr. Brown was also there. Where the telegram says, "Brown claims to know nothing as to how escrow stock was handled but admits it has been distributed," R. S. McKeon had gone to San Francisco to close the escrow and distribute the stock. On his arrival there he discovered that some of the stock that he had given to those different parties, which we expected to stay in escrow as long as we kept ours there, had been previously distributed. However, the orders had been given to the escrow holder to do it, but we felt that we had an understanding that all stock would be kept in escrow until the time we ourselves concluded to break the escrow. We had not taken any of our stock out or had not taken out any of the stock that the Drilling Company was retaining up to that time, other than some stock that we had put out for security at the bank, which was practically the same as the escrow, and through some mistake or misunderstanding some of the stock had been distributed out of the escrow in San Francisco. That is what that refers to. I had received a telegram from Bob and this was in reply to that telegram. The telegram further says, "Go to San Francisco and demand from Shingle numbers and denominations of all certificates released from escrow and to whom it went. This stock was all in our name and has to be accounted for by us. Therefore we have full right to know where it went." In Bob's telegram to me he had not made it clear who had received the stock or what had

become of it or what stock it was, and I was just giving him orders to get that matter straightened out in that way. The rest of the telegram which says, "Would not start any unnecessary fight with Shingle as I am not sure whether they were in on deal," refers to the deal to let the stock out of escrow. "Am satisfied will secure necessary financing for deal as all parties working in good faith and insist on my staying here until proposition is worked out. Believe will have something definite by middle next week."

The reference in Exhibit 343 to "Stock put up with Dabney note was ours," refers to the payment on his properties by the $250,000 note, concerning which I have testified. We put up a million shares of Italo stock belonging to the McKeon Drilling Company as security for that note, and prior to that time we had disposed of all the stock but two million shares, which stock we referred to as ours. There was other escrow stock that I was to use on this Dabney deal, but for some reason or other we got our stock in there and we got one million of the two million shares sent to Dabney, so out of the stock we retained, and I referred to that as our stock and to the other as promotion stock, as up to this time and prior to this time we had always referred to that stock as promotion stock, due to the fact that we were trying to promote this further financing with that block of stock.

The reference in this telegram, "Understanding with Wilkes that enough promotion stock would be sold in the meantime to pay note in the event deal did not go through, meant that two and a half million shares of stock that I had provided for Wilkes to finance with, and which I

(Testimony of John McKeon)

called promotion stock. That was stock I had set aside for the working out of this new company and the acquiring of properties for it.

I never wrote any letters to persons for the purpose of inducing them to purchase stock in the Italo Petroleum Corporation of America, and I never sold any of my stock other than what was sold over the Exchange, and did not make any representations or statements to anybody that were untrue that might induce them to go to the stock market and buy stock. Throughout the entire transaction I did not know of any activity on the part of anyone which was an artifice or plan to wrong the Italo Corporation. So far as I knew, everybody was working in the interests of the corporation.

With reference to the properties, there was a large property in the Coalinga field, which is shown on Exhibit MMM in red. That represents the Italo properties. Those properties are located in the Coalinga field, which is one of the oldest fields in the State and one of our best fields. There are no wells drilled deeper than 2800 to 3200 feet. I have always contended there is a deep sand underlying the Coalinga field, and there is a well that has been brought in recently, proving that as a most conclusive fact.

CROSS EXAMINATION

(By Mr. West:) With reference to the stock that I gave to Perata and Masoni, I expected that they would be very useful in the organization of what is known as the big company, and I expected them to be instrumental in helping to raise the capital to put the new company together, and that was my principal reason for giving them

62,500 units, and I had no other reason for that. There were no previous arrangements by which they were to get it, and I had no conversation with them with reference to the matter up to the time that I told them I would give them that stock.

CROSS EXAMINATION

(By Mr. Simpson:) With reference to Exhibit 297 and to the entries thereon, items 36 and 48 showing Bank of Italy, Vincent & Company market losses, 125,000 units, or 250,000 shares of Italo stock that was given by me to Frederic Vincent, that stock was given to Frederic Vincent to get him out of the picture so that we could get rid of his contract, because of his unsuccessful operation of the sale of the stock, and it was not given to him to compensate him for any market losses. I do not know of any market losses, but I knew of the controversy that was on between Vincent and the company, and knew that he was making this demand, and that unless his demand was met that he could cause trouble enough that would turn the whole business upside down, so therefore I was willing to settle. I knew at that time that Frederic Vincent had failed in his efforts to sell the stock and turn the cash over to the syndicate so that the company could meet its cash obligations.

With reference to the entries on Exhibit 297 showing approximately 450,000 shares of common stock going to Shingle, Brown & Company out of the McKeon escrowed stock, I figured that Shingle, Brown & Company were very well entitled to it, because I realized that if it had not been for the assistance of Brown and Shingle in Sep-

(Testimony of John McKeon)

tember or early in October that our whole project would have collapsed, and I realized at that time that Italo stock, unless the financial program was worked out, wasn't worth anything, that it would be selling for ten cents a share or less. I realized all of those things at the time I agreed to give them the stock. That was at the time I agreed to use the stock and settle with Vincent. I agreed to it as an inducement to the other brokers. There was no specification as to the amount of stock they were to receive, and we all figured that it would be a very hard job, and nobody contemplated that the money would come into the syndicate and that the sale of stock would be as rapid as it was. We contemplated that we had a year's or a half year's work ahead, and they completed it in approximately sixty days. That was after the company was reorganized and Mr. Lacy put in and the stock went overnight.

I also knew in December, 1928, that Shingle, Brown & Company had verbally agreed that they would finance one-half of the $10,000,000 bond issue that was then proposed, and that agreement was all made and entered into before I decided how much stock I was giving them.

CROSS EXAMINATION

(By Mr. Olson) The stock given to James V. Westbrook amounting to 25,000 units was given to him pursuant to a request to me from Mr. Siens to furnish Mr. Westbrook that stock in settlement of a dispute between them.

(Testimony of John McKeon)

CROSS EXAMINATION

(By Mr. Redwine:) The $300,000 that I subscribed to the big syndicate was in the form of payment on our property. It was accepted in lieu of cash as payment on our property. The syndicate paid the purchase price of the property, but the syndicate owed us $500,000 as the first payment on our property. In order to be able to close the deal we accepted $300,000, in syndicate subscriptions. I only sold Italo stock on the stock exchange. Some of it was sold through the M. Taber account. I was familiar with the Wilkes-Cavanaugh partnership and knew that certain of this McKeon stock was being delivered to Wilkes and Cavanaugh, and I knew it was going to be sold through some broker. After the stock had been sold the partnership sent me moneys as I needed them out of that account, and they rendered accountings to me. From the sale of that stock in that account I presume there was $238,551.40 that was paid to me, but I thought there was more. I think Alfred G. Wilkes got $146,-370.91 from that account and that Cavanaugh, according to the records, got $73,185.46. I don't know that Maurice Myers got anything from that account. However, he is charged with it on Exhibit 297.

With reference to Exhibit 297, line 35, "E. Byron Siens, Farmers & Merchants National Bank, loan, 200,000 shares of stock," the first note I sent Mr. Siens to the bank to borrow $50,000 for me, on my note; I believe they let him have the $50,000 but they wanted security on the note, and he said he would furnish them some Italo stock, and they said they had so much stock of the Italo in the bank for security that they wanted something else,

so he told them I had some other stocks in a brokerage house, which I had a $50,000 equity in and they said that instead of lending the $50,000 they would lend $107,000, and for me to have the broker send the stock over to the bank and they would pay him the balance on it and would loan us $107,000, which they did. In the meantime I believe they allowed us to use the $50,000 which I wanted to borrow on my note. The second note was made in the name of E. Byron Siens. My note was sent to the bank but I do not know what the mechanics of the deal was.

I first heard of the Italo-American Petroleum Company through Mr. Wilkes when he told me that he was going to become associated with that company. I furnished an appraisal of the gasoline contracts in the amount of $200,000, at Mr. Wilkes' request. I suppose that the company never made any money out of those gasoline contracts. I didn't come in contact with the Italo Petroleum Corporation any more until I talked with Wilkes relative to the acquisition of the McKeon properties. Wilkes and I had been in business together before and I knew that he was accustomed to raising money and to finances. Wilkes and I were the ones who first talked over the McKeon sale to the Italo. In our first conversation we didn't put any price upon the McKeon properties.

The next conversation was with my brothers, in which we finally decided to look into the deal further, and finally it was decided to look into the negotiations for a deal for the sale of the McKeon properties to the Italo. I do not recall the particular part of the deal that at first the purchase price of the properties in stock was to be 3,500,000 shares. There were some changes made after it appeared

(Testimony of John McKeon)

that the company was going to owe a great deal of money when they had the properties together. The contract finally resulted in a payment of 4,500,000 shares of stock. After the contract was executed I had a conversation with my brothers and discovered at that time that the financial condition of the Italo was not what it should be and that we had to get behind it and help it out. At the first conference with my brothers they did not say, "You take 2,500,000 shares of stock for your own and do that with it," but at that conference we didn't decide on any number of shares of stock and didn't figure that it would take anything like 2,500,000 shares. There wasn't any agreement on that until after I had gone into my deal step by step and gotten rid of a great deal of my stock, which was late in November or early in December. The first conversation with my brothers in which it was decided that I should use some of the McKeon stock for the purpose of getting behind the finances of the company was at that time. Also I was to use a part of that same stock to straighten out my real estate affairs and difficulties I had gotten into in San Bernardino, and I needed some money. That was in November, 1928. It could have been the latter part of October or the first part of November, 1928. It was after October 26, 1928.

The stock that was transferred from the name of Maurice C. Myers to the name of the McKeon Drilling Company was endorsed by me. I do not recall whether that conversation was before or after I endorsed that stock.

My first conversation was before we put the stock in escrow, where I agreed to furnish the stock for the Vin-

cent account. Before the stock was put in escrow I did not agree to furnish any stock to Perata or Masoni. I did agree to furnish stock to Shingle, Brown & Company. I had not agreed, according to my testimony, to give any definite amount of that stock to any of the persons except possibly Frederic Vincent & Company. In the course of all of these trials and tribulations of the Italo Company it became imperative to get Frederic Vincent & Company out of the picture, and for me to donate some of my stock for that purpose, and I did so donate some of the stock. We got nothing from that 250,000 shares of stock which we delivered to Frederic Vincent & Company.

Other stock was put up for Frederic Vincent & Company. Vincent first claimed that he had oversold 250,000 shares, but as time went on it developed that he had sold 400,000.

I have heard the testimony concerning the Frederic Vincent escrow in San Francisco and I heard the testimony that there was some 125,000 shares of stock put up to cover market losses, and I have heard the testimony that an additional amount of stock was put up in the Frederic Vincent escrow for the purpose of enabling them to fulfill subscriptions that theretofore had been taken by them. I have heard the testimony to the effect that Frederic Vincent & Company paid some $100,000 into that escrow, also the testimony to the effect that the McKeon Drilling Company got some $25,000 out of it. That, however, is not the 250,000 shares. That was some of the stock of the McKeon Drilling Company that was turned over to Frederic Vincent & Company. I knew Wilkes got some $25,000 out of that $100,000, because I

gave it to him. I knew that Siens got $25,000 because I gave it to him, and Shingle-Brown got $25,000 which I gave to them. With reference to the stock the syndicate had sold to Frederic Vincent & Company and received therefor about $86,000, for which later some of our stock was substituted into the syndicate and the $86,000 taken out, that $86,000 was divided four ways between Wilkes, Siens, Shingle, Brown & Company and the McKeon Drilling Company. The reason the division was made that way was that the stock was sold at a low figure. The syndicate didn't want to sell any stock. We figured Vincent got that stock and therefore we committed ourselves to Shingle-Brown that they would have some stock for financing the company. We agreed to furnish a part and pay a part out of the stock that they were to get, and everybody liked it. We didn't want to let it go at the price we were selling it, and therefore it was taken into consideration when we finally made the division.

The 60,500 units of stock that went to the International Securities Company was out of the stock that went to the McKeon Drilling Company on account of the transfer of its assets to the Italo Petroleum Company. That stock was sold by Mr. Bentley of the International Securities Company, but E. Byron Siens did not get the money derived from that. We got the money derived from the sales of that stock. I believe that happened to be credited to Mr. Siens on our books because I believe Mr. Bentley was selling stock, as I understood it, for Mr. Vincent. He got into some difficulty down here as Mr. Vincent's agent and we furnished the stock to take up the sales that he had made through the bank escrow, the same as he did

(Testimony of John McKeon)

in San Francisco. Mr. Siens looked after the details of that deal for us to see that the stock went into the bank and to see that the stock was delivered to the people who paid for it, and brought the check over and paid it into our office, if I remember correctly. If that money was later credited to the account of E. Byron Siens he gave us nothing for it. He never got credit for that money. I do not know that any of that money was delivered to Mr. Siens directly by Mr. Bentley.

In entering into the deal with the Italo Petroleum Corporation of America, I didn't consider its stock worth $1.00 per share. I knew it was a speculative value, that it might be worth $2.00 a share and it might be worth only 10 cents, which it finally turned out to be so far as we were concerned.

It is true that the contract provided that in the event the corporation couldn't secure the permit to issue the stock, that is, the 4,500,000 shares of stock that was to be a part of the consideration paid by the Italo Petroleum Corporation for the McKeon Drilling Company properties, that then the corporation was to issue promissory notes in the amount of $4,500,000. Their notes so far have turned out just about as good as their stock, so far as we are concerned.

I have related everything I know about the transfer of that 62,500 units of stock to Maurice C. Myers, and I think I knew at that time how much stock Robert McKeon was going to give him. I left that transaction to Robert McKeon.

With reference to Exhibit 74, there is nothing unusual about that. It was up to me as an officer of the company

(Testimony of John McKeon)

to direct that escrow. Robert McKeon didn't direct it at all. I do not know that I was an officer of the McKeon Drilling Company at that time, but the escrow was dominated and handled by me at all times. I considered that entire 2,500,000 shares of stock to have been transferred to me by my brothers for any use I wanted to put it to. I did not consider that I had to account for that stock to any person.

With reference to Exhibit 345, the reference by me to accounting for the stock referred to accounting for it from an income tax standpoint. The occasion of that telegram was that Bob had become very disturbed about certain stocks having gotten out of the escrow before we expected them to leave.

Prior to giving the 50,000 shares of stock to Mr. Westbrook, I had a conversation with Siens and Westbrook.

Q Now, I will ask you, Mr. McKeon, if it isn't a fact that you were advised that in the Brownmoor deal there was some 250,000 shares of Brownmoor stock which had been transferred from the Brownmoor to the Monrovia Oil Company, and that thereafter there was supposed to have been a lease transferred from the Brownmoor Oil Company to the Monrovia Oil Company, and that 250,000 shares of Brownmoor Oil Company stock so held by the Brownmoor Oil Company was cancelled?

A There was something to that effect. I don't know just what the mechanics of it was. There was a dispute some way or other.

Q And you were advised at that time, were you not, that Mr. Westbrook thought he should have his pro rata

(Testimony of John McKeon)

of 750,000 shares of Brownmoor stock outstanding instead of 1,000,000 shares outstanding?

A I believe that was the controversy.

I do not recall exactly the mechanics about the matter, although I knew there was a dispute between Siens and Westbrook. I did not make any inquiry at that time as to how the other stockholders of the Brownmoor were going to fare because of the failure to cancel the 250,000 shares of stock transferred to the Brownmoor Company by the Monrovia Company in return for the lease. I had no interest in the deal or in the stockholders. Westbrook and Siens had a dispute in which they finally agreed that there should be a settlement made, and whether that is what it was about or whether that was the dispute or not, it was no affair of mine at all. I have 50,000 shares of stock to Mr. Westbrook to satisfy him at the request of Mr. Siens, and did not receive any money for that stock.

Q You didn't receive any money for that stock?

A No, I did not.

Q It was just a gift?

A Well I expected to get the stock back, and I expected to be compensated for it, but never was.

Q You expected to get the stock back from Mr. Siens?

A No, I expected to, because it was agreed at the time that Mr. Siens and Mr. Westbrook would finally work out their own settlement and that the stock would be returned to me.

Q Who was it returned it to you?

A Mr. Westbrook.

Q Mr. Westbrook returned it to you?

A Yes.

(Testimony of John McKeon)

Q Then you just placed that stock in the hands of Mr. Westbrook as sort of a security for the obligation that Mr. Westbrook claimed Mr. Siens owed him?

A It was more or less that way, yes.

Q Then that was a loan of the stock instead of a gift?

A Well, it was at that time.

Q Did you get any agreement from either of those persons wherein they agreed to return that stock or any of it to you?

A I did not.

Q Now, you wrote this Defendant's Exhibit Q, did you not, Mr. McKeon?

A I believe I did.

Q In this letter you state on November 28, 1929, addressed to Mr. Westbrook: "Dear Sir: This is to assure you that there is being held for you in escrow together with my stock 25,000 shares of common and 25,000 shares of preferred stock of the Italo Petroleum Corporation which I will personally see is delivered to you when the escrow is closed. The exact date cannot be determined at this time as this stock is being held in escrow until certain treasury stock has been sold, which I believe will be accomplished not later than February 1, 1929. However, I cannot be positive of that date." So that on November 28, 1928, you had decided to give this 50,000 shares of stock to Mr. Westbrook, hadn't you?

A Apparently, yes.

Q And it was along in the spring of 1929 before this stock was finally delivered to Mr. Westbrook, wasn't it?

A It was.

(Testimony of John McKeon)

Q And that was only a loan for the benefit of Mr Siens for them to adjust their affairs, is that right, Mr McKeon?

A It was a guarantee that they would adjust their affairs.

Q Now, later on, Mr. McKeon, after you had given that out to Mr. Westbrook, either you or R. B. McKeon or Raleigh McKeon gave orders requesting the delivery of certain stock to Mr. Siens, didn't you?

A I don't recall. I suppose we did if you have the order there.

Referring to Exhibit 109, the stock that I ordered given to Siens in that and other orders and the stock that was delivered to Siens was delivered for my account and benefit. He was to and did perform certain services for me, and I was to personally receive the benefit of those services.

Q It was not for any services that he had or expected to perform for the Italo Petroleum Corporation of America, is that right?

A Well, of course, he had performed a lot of services for the Italo. He probably received some profit on some of that stock. I don't know how much.

That was a stock receipt that was used in that escrow to account for all stock that was delivered out. The language of the receipt was copied from a receipt made by Maurice C. Myers when he closed up with Vincent. Our office used that as a copy. That is my signature to Exhibit 109. It is dated December 22, 1928, which was the date that the distribution of all of that stock was accom-

plished. It was done before the first of the year, and those letters were all written on the 22nd of December and turned over to the escrow holders so that the stock would be accounted for by them at that time. That stock was delivered to Mr. Westbrook for the benefit of Mr. Siens. On that stock that was being delivered we wanted our income tax records clear on it and we used this receipt to make that clear. We paid a $300,000 tax, and I paid a $100,000 personal tax on that deal. I testified that the stock was given to Westbrook to satisfy him because of the claim that he was making on account of this non-cancellation of stock of the Brownmoor Oil Company in the Monrovia deal. I am taking the same position now. That receipt does not entirely reflect the transaction. The fact of the matter was that Siens and Westbrook, in the future, were to make a settlement and I was to be relieved of the obligation if they did. If Siens was unable to do so, why, of course, I had guaranteed a settlement with that stock, and I was not under any obligation in the matter at all. The stock was delivered to Westbrook to guarantee him that the claim would be satisfied or otherwise he would have the stock.

There were some 450,000 shares of stock given to Shingle, Brown & Company because of their services rendered relative to the big syndicate and services to be rendered in the organization of the new company that I was contemplating putting over. I was never advised that Shingle, Brown & Company had received in receipts some $84,000 because of the syndicate stock that was sold through the various pools. I expected them to make an underwriting profit out of the bond issue, but at the same

(Testimony of John McKeon)

time those underwriting profits are very small and no brokers handle a new bond issue on a new operation without a stock interest in it—no bond company in the United States. I expected one-third of the commission on the Graham-Loftus deal. The only services that I performed for that one-third interest was to refer a man from the Richfield office to the Italo office. That man was Lou Wertheimer. At that time he was in the brokerage business; he is now running a cafe, but I do not know the name of the cafe. No one was present at the conversation I had with Mr. Wertheimer, and he gave me no written agreement to give me a third of the commission. I don't believe I ever talked with Wilkes about Wertheimer giving me a third of the commission. All Wertheimer said was, "Well, if I make a sale to those people, I will give you a third of the commission, of whatever commission I get." However, he never gave it to me and I never made any demand for it. I know from the records that Wertheimer was to receive $30,000 commission. I found that out a long time afterwards. The fact of the matter is I have never received a dollar commission in my life on anything, but I expected I was going to receive that commission at one time.

RECROSS EXAMINATION

(By Mr. Olson:) Westbrook never gave any receipt for his stock similar to the other receipts that are in evidence. The stock was delivered to him by Clay Carpenter.

(Testimony of John McKeon)

RECROSS EXAMINATION

(By Mr. Redwine:) I know that in corporate affairs the directors of the corporation either vote for or against a transaction that the corporation might enter into, and I know that Westbrook was a director of the corporation on July 5, 1928, and could have voted for or against the proposition that was presented to the Italo Petroleum Corporation of America.

(Examination by the Court:) I have outlined the financial status of Italo between September 15th and October 15th. This quantity of stock, 2,500,000 shares, was given to those various people in recognition of their services to the proposed new corporation principally. It didn't occur to me and I didn't, instead of giving that stock to those various people, order it sold for the benefit of the Italo Corporation to relieve them of this financial stringency. At that time there was a great deal of difficulty in selling stock. The corporation or the syndicate had a lot of stock that could not be sold and we couldn't turn the stock into money. My theory was (it might have been wrong) that the way to bring about a situation where we could sell stock for money was to tighten up our organization and get the good will and cooperation of everybody in it. At that time the morale of the organization was very low. Everybody had apparently figured that it was a failure, and you know how men sometimes lay down under those conditions and circumstances.

Shingle-Brown sold stock, but not at that time. Beginning September 15th to October 15th we were not raising any money at all, either by subscription to the syndicate

(Testimony of John McKeon)

or sale of stock. After we had reorganized the company and had moved the offices to Los Angeles and had taken hold of it in a good way, then the stock began to move very rapidly, and the people wanted to begin to join the syndicate.

With reference to selling that two and a half million shares of stock for the benefit of the corporation, at that time, that is, the time we are talking about, the offer of stock for sale of the corporation wouldn't have done any good, because there was nobody buying the stock. Of course, at subsequent times I probably could have used it to better advantage, but I didn't know it at the time.

(Examination by Mr. Abrahams:) I did not know and was not advised by my counsel at that time that it would have been a violation of the laws of the State of California to have sold that stock for the benefit of the corporation.

RECROSS EXAMINATION

(By Mr. Redwine:) From October 16th onwards the pool formed by Shingle, Brown & Company didn't have much difficulty in the sale of that stock, but nobody contemplated that they were going to have the success they did have. You had to figure that it was a hard job. At the time some 311,000 shares of stock was delivered to the partnership of Wilkes & Cavanaugh to be sold through that partnership, there wasn't any understanding as to how the proceeds from the sale of that stock were to be split. I was to use that money in the financing of our new operations; that was principally the way that was. It was not part of my financing to give a part of the pro-

(Testimony of G. S. Goshorn)

ceeds of that stock to Wilkes and Cavanaugh. They did get some part of the proceeds of that stock, but they were working and had other income.

Thereupon the defendants Alfred G. Wilkes, E. Byron Siens, William J. Cavanaugh, John McKeon, Robert McKeon, Raleigh McKeon, Maurice C. Myers, Fred Shingle, Horace J. Brown and the remaining defendants rested their case.

Whereupon the following witnesses were called in rebuttal:

G. S. GOSHORN,

a Government witness, testified under oath as follows:

In my examination of the books of the partnership of Wilkes & Cavanaugh, I find entries regarding the division of the money received from the sale of the McKeon stock. Journal voucher 39, dated December 31, 1929, reflects the division of the receipts from the sale of the Italo stock was $6000 to *Marucie* C. Myers and $238,551.40 to John McKeon. Journal voucher No. 40, dated December 31, 1929, reflects that there was transferred to the profit and loss account in the books of Wilkes & Cavanaugh proceeds of $234,285.16. The profit and loss account itself reflects that at the end of the year the profits were divided one-third to William Cavanaugh and two-thirds to Wilkes.

I have examined the books and records of Shingle, Brown & Company in evidence to ascertain the so-called pool operations of Shingle, Brown & Company. Those are contained in exhibits 188, 225, 226, 319, 320 and 325.

(Testimony of G. S. Goshorn)

The examination of these accounts reflects that on November 25, 1928, Fred Shingle as syndicate manager sold to the syndicate and brokers' pool, or pool A, 350,000 shares of common stock of Italo at $1.13 per share for a price of $395,500. On the same date, November 5, 1928, the syndicate and brokers' pool, pool A, sold 350,000 shares of common stock of Italo-Pete to pool B at $1.25 a share, making the sum of $437,500, or a profit of $42,000 to pool A. Members of pool A were Graham-Adkinson, Plunkett-Lilienthal, Meigs & Company and Shingle-Brown. Pool B members were Plunkett-Lilienthal, Graham-Adkinson, Meigs & Company, M. H. Lewis & Company, Dunk Harbeson & Company and Shingle, Brown & Company.

On November 8, 1928, Fred Shingle as syndicate manager sold to the syndicate and pool A 150,000 shares of common stock of Italo Petroleum for $170,197.25. On the same date Pool A sold 150,000 shares of Italo Petroleum to pool B for $187,500, making a profit of $17,302.75. There was a similar transaction on December 19, 1928, when Fred Shingle as syndicate manager sold 70,000 shares of common stock of Italo Petroleum for $82,600 to pool A. On the same date the pool A sold 70,000 shares of common stock of Italo Petroleum to pool C for $91,000, making a profit to pool A of $8400. The members of pool A were, Graham-Adkinson, Plunkett, Lilienthal & Co., Meigs & Co. and Shingle-Brown. The

members of pool C were Plunkett- Lilienthal, Meigs & Co., M. H. Lewis & Co. and Shingle, Brown & Co. Shingle, Brown & Company were members of all of the pools. As a result of these pool operations Shingle, Brown & Company received $84,128.21.

CROSS EXAMINATION.

(By Mr. Simpson:) I knew the matters I have testified to on rebuttal at the time I testified on direct examination in the main case. My testimony referred to certain pool operations of certain pools that were formed for the purpose of disposing of the Italo Petroleum Corporation of America stock that was held by the syndicate.

On November 5, 1928, Fred Shingle as syndicate manager sold to pool A approximately 350,000 shares of common stock of the Italo Petroleum Corporation of America at a price of $1.13 a share. That stock had been optioned by Fred Shingle as syndicate manager to this brokerage pool as of October 15th or 16th, 1928, and comprised a part of the 3,000,000 shares of common stock that were delivered to the syndicate in return for which the Italo Petroleum Corporation of America was to receive the sum of not more than $3,500,000. The 350,000 shares of common stock sold by pool A to pool B on November 5th was at $1.25 per share, or a difference of 12 cents per share from the price at which pool A bought that stock. The $395,500 that Fred Shingle as syndicate manager received from the sale of the 350,000 shares of common stock he sold to pool A was taken into his account and accounted for when he made his final settlement with the Italo. In other words, he received it as syndicate

(Testimony of G. S. Goshorn)

manager and according to the syndicate agreement he paid it to the Italo Petroleum Corporation of America or to Myers as trustee, or paid it out under direction for the benefit of the Italo Petroleum Corporation of America. The profit on that transaction amounted to $42,000 to pool A, in which there were four members, although there were six members in pool B. Any profits were divided in four equal parts between the pool members of pool A. I would designate that $42,000 as a profit from a single operation. It was taken into the profit and loss account as an income item, together with many other items of income.

On November 8, 1928, Shingle as syndicate manager received from pool A for the stock $170,197.25, for 150,000 shares of common stock. Pool A received $187,500 for the stock they sold to pool B. That $170,-997.25 received by Shingle as syndicate manager for the sale by Shingle to pool A of that stock follows the same course as the $395,000 last referred to, and went for the benefit of the Italo Petroleum Corporation of America. That money received by pool A from pool B for that stock went into the account of Shingle, Brown & Company as income for their fourth and issued checks to the other pool members for their fourth. I do not know what the other pool members did with their share.

The third transaction was December 19, 1928, when Shingle as syndicate manager sold pool A 70,000 shares of common stock at $1.18 per share, receiving therefor $82,600, which Shingle as syndicate manger used in accordance with the syndicate agreement for the benefit of

the Italo Petroleum Corporation of America. Pool A sold that 70,000 shares of stock to pool C at $1.30 per share, or a difference of 12 cents per share, which was divided four ways among the members of pool A.

I did not know whether it was necessary for me to examine the books and records of the company for the purpose of ascertaining whether or not in connection with these pool operations it was necessary for them to buy on the market large blocks of stock. At subsequent dates there were transactions apparently of purchases and sales of stock. The brokerage terminology being long on stock means that you have more stock on hand than you have sold. In my examination of those records of those pools I found that they were long on stock on many occasions. I could not tell you how many. On January 31, 1929, pool A was long 172,901 shares of common, and on that date pool B was long 19,733 shares of common stock.

Q Now, you have given some testimony respecting these matters, I believe you referred to them as profit. and stated that in the books of Shingle, Brown & Company they were carried into the accounts as income. Did you examine the books and records of Shingle, Brown & Company for the years ending December 31, 1928, and 1929, for the purpose of ascertaining the profit and loss account of that firm from all of their transactions?

A I have for the year '29, not for '28.

Q What period of time did you say that these pool operations were carried into the records as income or receipts or profits, or whatever you want to call it?

A In the year '29.

(Testimony of G. S. Goshorn)

Q Oh, they were carried in the year '29. I will ask you if it is not a fact that from an examination of the books and records of Shingle, Brown & Company for the calendar year 1929 it shows total earnings of $1,229,692.09 from all operations.

A Which are you speaking of, the corporation or the partnership?

Q I am talking about the consolidation of the two.

A I have not them consolidated here.

Q What do you have?

A Nor have I the single total on all the income. I can give it to you. All the income items are here.

Q What did you take, just the corporation or the partnership?

A No, I have both of them.

Q Isn't it a fact that for the year 1929 the total earnings for the partnership were $729,904.75?

MR. REDWINE: That is objected to on the ground that it is incompetent, irrelevant and immaterial and not proper cross-examination.

MR. SIMPSON: I think it is material. Apparently the Government seems to think there was some significance about making a profit out of some transaction. We expect to show that this was all part of a general business operation, that their gross income was so much, that the operating expenses and other expenses were so much, and get the conclusion as to the net results from all operations.

THE COURT: If there is anything culpable in the profit made from the stock of the Italo, do you think that that would be lessened by the fact that they might have made losses on some other stock?

(Testimony of G. S. Goshorn)

MR. SIMPSON: I don't think, your Honor, that there is any culpability in the transaction at all.

THE COURT: Well, I know you don't.

MR. SIMPSON: But the Government seems to, and they are bringing this in as rebuttal, and I did not object to it because I thought the court might want to get the whole picture, but I do think as long as they are emphasizing these matters it is important to show that, as Mr. Shingle has already testified, the expenses of these concerns during this time ran between thirty and forty thousand dollars a month and to show that this was just one transaction out of a large volume of business.

THE COURT: Well, now, Mr. Simpson, my distinct recollection is that the identical question came up during the examination of the same witness. As I remember I expressed the opinion at that time, that it did not make any difference what he made or lost on other matters, if it assumed, and on that the Court expresses no opinion that there is anything culpable with his transactions with respect to this stock, it would not make any difference in the world that he might have made losses on other totally unrelated transactions. I think that is obvious. The objection is sustained.

MR. SIMPSON: We take an exception. I was going to inquire of this witness, your Honor, with respect to the gross income, the expenses and the earnings, and I understand from the ruling of the court that I am not permitted to do so, is that correct?

THE COURT: Yes.

MR. SIMPSON: So that it would be understood that I would make an offer to prove those things along those

(Testimony of G. S. Goshorn)

lines and the Court's ruling is the same, and I take an exception.

(Examination by Mr. Wood:) I am acquainted with the auditor for the Government by the name of Finnell. Finnell and myself both examined the Wilkes & Cavanaugh partnership books. We were working on a particular account, and I might make a transcript of the account and he would make a transcript of the journal entries and the cash book entries that were referred to in that account and we would work them together that way.

(Examination by Mr. Meader:) With reference to the journal voucher No. 39 in the Wilkes & Cavanaugh books, the debit shows the sale of I. O. P. common and preferred, $244,551.40. The credit is John McKeon, $238,551.40, Maurice C. Myers $6000. The explanation is payment to both parties for their stock sold through Bacon & Brayton. As I recall it there were several vouchers that are marked 39, and if you consider them all together as one voucher, that is not what appeared on all of them, but that is what appears on that one particular voucher. That is my recollection of it. Most of the notations on journal vouchers bear the notation "Authorized, A. B. Lyle." I only know that Mrs. Lyle told me that she kept the books for Wilkes & Cavanaugh. In the Wilkes & Cavanaugh books appears the Myers account showing that on April 5, 1929, "Through Bacon & Brayton" with reference to journal 7, a debit of $6000, which account was closed off by the journal voucher 39, which I referred to. It says, "Portion of sale, I. O. P. common and preferred." Journal voucher 7 is dated April 8, 1929, a debit to

(Testimony of G. S. Goshorn)

Maurice C. Myers for $6,000, a credit to Bacon & Brayton for $6,000, with the explanation "Check of Bacon & Brayton given to Maurice C. Myers for stock deposited with Bacon & Brayton." That particular journal voucher is not authorized. That appears to be the only item showing any payment to Mr. Myers.

With reference to Exhibit 297, line 26, showing $305,-180.00, stock sold for the account of Wilkes, Cavanaugh, Myers and J. McKeon, that was originally 311,180 shares, which were originally placed in the account of Egon Tropp. 6000 shares were subsequently returned from the Egon Tropp account and placed in the M. Taber account, and then sold through that account, and the Wilkes & Cavanaugh books considered the two accounts together.

The $6000 item on that chart charged to Maurice Myers is reflected by the books of Wilkes & Cavanaugh, together with the Bacon & Brayton check introduced in evidence. Mr. Myers received $6000 from that entire transaction. Whether the $6000 he received came out of the moneys from the stock sold in the M. Taber account or the E. Tropp account, I am not sure. The books do not reflect from which account Mr. Myers received his $6000; it merely reflects that Mr. Myers received a check from Bacon & Brayton. The books reflect that the 6000 shares were sold from the M. Taber account. The names appearing on line 46 of Exhibit 297 refer to stock sold in the E. Tropp account. I do not say that those 6000 shares were sold for Mr. Myers. I say that out of the combined transaction received from the M. Taber account, Wilkes and Cavanaugh received some $30,000 from that sale;

(Testimony of James R. Fahey)

from the sale through the E. Tropp account they received some $420,000 or $430,000. Those two items were combined together in the account called "Sale, I. O. P.," meaning Italo common and preferred, $460,000. The money was divided as shown in the realization account, $238,000 in round figures to John McKeon, $6,000 to Maurice C. Myers, and $219,000 to the partnership of Wilkes & Cavanaugh. The Wilkes & Cavanaugh partnership books show the distribution to Myers of $6,000 from the sale of I. O. P. common and preferred.

JAMES R. FAHEY,

a Government witness in rebuttal, testified under oath as follows:

I am a post office inspector and have been since 1912. With reference to the testimony given by the defendant Cavanaugh when he was on the stand as follows: "A The same year. Mr. Fahey and Mr. Marles came into my office at Walsh, O'Connor & Company. It was quite a busy office. We retired to a small room that we have there to interview customers. They sat down. Mr. Marles didn't have much to say. Mr. Fahey did all the talking. He said, 'Mr. Cavanaugh, you are a young man, you are newly married, you have what may be a very promising career in front of you.' He said, 'Did you ever stop to consider what an indictment might do to you?' I said, 'I have never considered an indictment in connection with myself at any time.' He said, 'Unless you get on the witness-stand and testify that that $72,000 in the Brownmoor deal actually went to Mr. Wilkes and not to you, you are going to be indicted.' I told him that I

(Testimony of James R. Fahey)

was perfectly willing to get on the stand and testify to the truth, indictment or not, and invited him to leave the office."

I had a conversation with Mr. Cavanaugh, but I did not have all of that conversation with him. I never told Mr. Cavanaugh that unless he got on the witness-stand and testified that $72,000 in the Brownmoor deal actually went to Mr. Wilkes he was going to be indicted.

CROSS-EXAMINATION

(By Mr. Wood:) I did have a conversation with Mr. Cavanaugh but I do not think that prior to that conversation I had had an opportunity of making an examination of the books of the partnership of Wilkes & Cavanaugh. Prior to that time I had asked Mr. Cavanaugh to come up to the inspectors' office and have a talk and he did not come. He said he was too busy. We then made arrangements to go down to the offices of Walsh, O'Connor & Barneson, where he was employed, to talk to him there. I asked him about his income tax return, and he said that Mr. Sully had prepared it, and that I would be able to find the figures over there. I asked him then to authorize Mr. Sully to let me examine what records he had relative to the 1928 income tax return, and it is my understanding that he did so authorize, and I then went to Mr. Sully's office for the purpose of examining the records. Mr. Sully stated that he did not know of the records of Mr. Cavanaugh, that he had returned them, he believed, to Mrs. Lyle. Those records of 1928 were never produced. I informed Mr. Cavanaugh the result of my inquiry to Mr. Sully, and he said, "Well, then, Mrs. Lyle must have

(Testimony of William J. Marles)

them." So I went over to see Mrs. Lyle, but she was unable to locate them. I have no personal knowledge that Mr. Cavanaugh paid the income tax on the $72,000 that he earned in 1928. The income tax return was rendered, indicating that he accounted for that as income. What he paid I do not know.

WILLIAM J. MARLES,

a Government witness, testified in rebuttal under oath as follows:

I have been a post office inspector since 1903, and I heard the testimony of Mr. Cavanaugh relative to the conversation that you just read to Mr. Fahey. Mr. Fahey and I never stated to Mr. Cavanaugh that unless he got on the witness-stand and testified that the $72,000 on the Brownmoor deal actually went to Mr. Wilkes and not to him that he, Cavanaugh, was going to be indicted. I did not threaten him with an indictment at any time.

CROSS EXAMINATION

(By Mr. Wood:) I was present at the time of a conversation.

Thereupon each of the defendants specifically moved the court to strike from evidence and to limit the testimony introduced in the cause upon each and all of the grounds above set forth made at the conclusion of the plaintiff's case in chief which said motion to strike and limit was specifically renewed on behalf of each and every defendant, said motion was by the court denied and an exception noted. Thereupon each defendant separately moved for himself that the court instruct the jury to

(Testimony of William J. Marles)

return a verdict of not guilty as to each and every defendant separately upon each and every count of the indictment upon the grounds and for the reason that the evidence was insufficient to justify the case in going to the jury and would be insufficient to sustain a verdict of guilty if one were returned, and upon the further grounds hereinabove stated and contained in the motion to direct verdict of guilty made at the conclusion of the Government's case in chief, which said motions for instructed verdicts of not guilty were specifically renewed at the conclusion of all of the evidence introduced in said cause. Said motions and each and all of them were by the court denied and exceptions noted.

Thereupon the cause was argued to the jury by counsel for the respective parties, and during the opening argument of said cause to the jury Mr. Redwine, Special Assistant United States Attorney General, made the following statement to the jury:

MR. REDWINE: ***** Again at page 219 of the transcript Mr. Fyfe testifies that he gave the following notice and warning to these defendants. He testifies as follows:

"I stated that I did not know Mr. Wilkes personally, but I did know of him by reputation. That his reputation was that of a pure promoter."

And then he says, "I think I used the term "unscrupulous"—

MR. SIMPSON: We assign that statement of the District Attorney as misconduct on the grounds and for the reason that the Court ordered that particular portion of the testimony stricken from the record, and Government counsel is referring to matters that are not before the Court or jury.

MR. REDWINE: Let's see page 219 of the transcript.

THE COURT: Well, I have no recollection of the matter as to this. There was stricken from the record particular details of what somebody told about Mr. Wilkes. That was stricken from the record, because obviously I think it had no place there. The general nature, however, of the information given, I think, was properly in the record for whatever it might have been worth.

MR. REDWINE: I can read your Honor the record.

MR. SIMPSON: If you will read further in the record, you will find that, I believe, on the following day the Court upon motion of Mr. Olson or someone else ordered it stricken.

THE COURT: Well now, just a minute. You put your heads together there and read what the record says. Then we will know. Mr. Redwine will do the reading.

(Mr. Redwine thereupon read from the record the portion of the record in dispute as hereinabove set forth and the defendants called the court's attention to the following motion and ruling made by the defendants at the time said evidence was admitted:

MR. WOOD: I move that the language "I think I used the term unscrupulous" be stricken out and that the

jury be instructed not to consider it. It is purely an opinion of the witness.

THE COURT: Yes, that should be definite, and the motion is granted, and the jury is so instructed. Further explain, Mr. Fyfe, what did you mean by saying you think?

A. That is my memory of the conversation.

THE COURT: Very well."

MR. SIMPSON: I submit that I am correct in that the Court did order it stricken out.

THE COURT: No. It will stand just as it is: That a statement made to those present—to whom was this statement made, Mr. Perata?

MR. REDWINE: Mr. Perata and Mr. Masoni.

THE COURT: As to characterizing or giving his opinion as to the statement as to the reputation of Mr. Wilkes was properly in the record. Go on.

MR. SIMPSON: Exception.

MR. REDWINE: (Continuing) He (Mr. Fyfe) testified as follows: "Mr. Perata had called me into the room in the Biltmore and asked me how I thought things were going along with the Italo Company. I told him quite frankly that I thought the Italo was getting in very bad shape, that it was generally rumored that the Italo was buying properties at prices very much more than their value. That men of very bad reputation were being brought into the company. The company was getting a very bad name, and that if he was not careful, the result would be that he and his Italian stockholders would suffer heavy losses. Mr. Perata told me that he realized that

the men he was dealing with were, I think if I may use the expression, pretty tough customers, but that he was watching them, and that they would not put anything over on him."

Now, Mr. Perata and Mr. Masoni—

MR. OLSON: If the Court please, I assign as error and misconduct on the part of counsel the reading of the statement that Mr. Fyfe told the defendants referred to that men of bad reputation were coming into the company, because I distinctly know that I made a motion to strike that out, and on the following day your Honor ordered it stricken.

MR. REDWINE: I don't recall that. If that happened, it is not in the transcript there.

THE COURT: Proceed.

MR. OLSON: Exception.

MR. REDWINE: Now, the evidence shows that there is a $25,000 item that is missing. Mr. Masoni claims that he got 21,000 shares of stock instead of the credit in the Montgomery Investment Company, and I will read that testimony later, but this fact remains that there was $25,000 credited to Mr. Masoni's account. There is a lapse of $25,000 in some place. The testimony as a whole probably shows this: That Wilkes went in and got that $25,000 out of the future account of Mr. Masoni that was to go into the big syndicate.

MR. WOOD: Now, if the Court please, I object to that statement, because there is nothing in this evidence to that extent, and that is merely an unjustifiable inference drawn by the District Attorney.

THE COURT: Clearly, Mr. Wood, and I am sure that this is the rule, that counsel in arguing to the jury may indulge his own conclusions from what is shown in the evidence. I certainly would be sorry to think that there was any other rule in times past. Now, don't interrupt. Please don't do that. Those interruptions are unseemly entirely.

Prior to the opening argument by counsel to the jury and pursuant to the rules, practice and custom of the court in such cases made and provided, the defendants through their counsel requested the court to give to the jury certain instructions each and all of which were numbered and are hereinafter set forth following the charge of the court to the jury in connection with the exceptions taken to the court's charge to the jury, and the court's failure to give said requested instructions and to avoid unnecessary repetition the said requested instructions, the refusal to give which is assigned as error, are set forth in connection with the exceptions taken at the conclusion of the court's charge to the jury.

Thereupon the court instructed the jury as follows:

THE COURT: Gentlemen: As a preliminary let me commend the services that you have—are performing—not quite ended yet, and the careful attention and earnest frame of mind which I believe you have exhibited throughout this trial, long, interesting no doubt, but obviously at a great personal inconvenience to your own affairs; that is the duty of the citizen, however.

You are now called upon to discharge one of the most important duties that will ever devolve upon you as Citi-

zens, and that is to determine whether the defendants at the bar are innocent or guilty of a violation of the law of the land. We have all, the Court and jury alike, taken an oath faithfully and honestly to discharge our duties, and to determine this case according to the law and the evidence. We are neither of us responsible for the law under which this prosecution is being had, nor are we in any way responsible for the various acts of these defendants as shown by the evidence here upon the trial, and which the Government claims shows that they have violated the laws of the land. Nor are we in any way responsible for the consequences that may follow a verdict, if it is based upon the law and the testimony. When we have administered the law and determined the facts, as we understand the matter, and have returned a verdict, and it has been received and recorded, our duty, so far as this case is concerned, is fully discharged.

Now, in the performance of this duty, the Court and the jury both have important functions to perform. It is the duty of the Court to declare the law by which the case shall be determined. And it is your duty to accept that declaration as a correct statement of the law without regard to your own opinions as to its wisdom. The instructions of the Court as to the law of the case you are not at liberty to disregard. On the other hand, it is your exclusive province and duty to determine all questions of fact in the case and the credibility of the witnesses. The Court has no more right to invade your province than you have to invade its, the Court has expressed or shall hereafter express or indicate an opinion as to any disputed question of fact in the case, or as to

the credibility of any witness, you are not to feel bound by it unless it conforms to your belief and understanding.

It now becomes the duty of the Court to instruct you on the law of this case, and it becomes your duty to apply the law thus given to you to the facts before you. You are the sole judges of the facts. It is for you to say where the truth lies.

It is the duty of the jury to give uniform consideration to all of the instructions here given, to consider the whole and every part thereof together.

It is the duty of the jury to decide whether the defendants be guilty or not guilty of the offense charged, considering all of the evidence submitted to you in the case. It is not for you to consider the penalty prescribed for the punishment of the offense at all. If you are aware of the penalty prescribed by law it is your duty to disregard that knowledge. The question of punishment is left wholly to the Court.

While it is your duty to consider carefully argument of counsel in the case and while it is the right of counsel to give his own interpretation of the evidence, you are at all times to remember that the argument of counsel is not evidence and you are not to consider it as such, either when made to the Court during the trial or to the jury. Neither are you to take into consideration any evidence offered, but the admission of which has been refused by the Court's ruling, nor evidence although once admitted which was later stricken out under the Court's ruling. Such evidence is to be deemed by you as though never given.

The indictment in this case, as amplified and rendered definite by the Bill of Particulars furnished by the Government, charges: That the defendants originally charged being: Alfred G. Wilkes, E. Byron Siens, William J. Cavanaugh, Maurice C. Myers, John M. Perata, Paul Masoni, John B. DeMaria, James V. Westbrook, Howard Shores, John McKeon, Robert S. McKeon, Raleigh B. McKeon, F. P. Tommasini, Edgar P. Lyons, Fred Shingle, Horace J. Brown, Axton F. Jones and Rossiter L. Mikel devised and intended to devise a scheme and artifice to defraud Italo Petroleum Corporation of America, Rasmus H. Anderson, Grace E. Dennison, George J. Geis, La Vinna Hill Hopkins, Mary E. Hill, J. H. Hudspeth, N. D. Kuhlman, Mrs. Emma Riniker, O. J. Rohde, Leo Willman, and a large number of persons whose names are unknown, including those persons who should be solicited to purchase and did purchase stock of the Italo American Petroleum Corporation and the Italo Petroleum Corporation of America, and to obtain money and property from the persons to be defrauded by means of false and fraudulent statements and promises set forth in the indictment.

That it was part of the scheme that the defendants should, and they did, in executing it act through their own names, and the names of Italo American Petroleum and Italo Petroleum Corporation of America.

That they should and they did, on or about March 5, 1924, organize the Italo American Petroleum Corporation and issue and sell stock therein, and on March 8, 1928, organize Italo Petroleum Corporation of America, and sell preferred and common stock therein.

That they should and they did dominate and control, the activities of both corporations.

That some of the defendants, being: Shingle Brown, DeMaria, Mikel, Jones, Tommasini, Masoni, Wilkes and Perata, on or about May 16, 1928, should and they did lend the Italo Petroleum Corporation of America Eighty Thousand Dollars ($80,000.00), and that these same defendants some of whom being: DeMaria, Tommasini, Perata, Wilkes and Masoni, who were then directors and officers of Italo Petroleum Corporation of America, should and they did wrongfully receive for their own use as a bonus for making the said loan eighty thousand shares of the capital stock of Italo Petroleum Corporation of America without the knowledge or consent of the persons to be defrauded.

That while dominating the activities of Italo Petroleum Corporation of America, and while some of the defendants, being R. S. McKeon, Perata, Wilkes and Masoni, were acting as officers and directors of the said corporation, the defendants should and they did cause the corporation to enter into an agreement to purchase the assets of Brownmoor Oil Company, which agreement provided that the said Italo Corporation should, and it did, pay in excess of the actual value of the assets, and that they, the said defendants, R. S. McKeon, Wilkes, Perata, Masoni, Tommasini, DeMaria, Siens, Westbrook and Shores, should and they did issue and cause the said Italo Corporation to issue 600,000 shares of preferred stock as part of the purchase price of the said assets, and that some of the defendants, being Shingle, Brown, DeMaria, Mikel, Jones, Tommasini, Masoni, Wilkes, Perata, Shores, Sines,

Westbrook and R. S. McKeon, should and they did, wrongfully receive a part of the stock so issued, and the proceeds derived from the sale of the stock, without the knowledge and consent of the stockholders of the said Italo Corporation. That defendants Perata, Wilkes, Masoni and Robert S. McKeon should and they did, on or about May 11th, 1928, cause to be filed with the Commissioner of Corporations of the State of California an application for a permit to issue 600,000 shares of common and 600,000 shares of preferred stock of Italo as a part of the purchase price of the said assets of the Brownmoor Oil Company, which said permit should and it did provide that the said stock be issued to Brownmoor Oil Company.

Throughout this charge, gentlemen, where the corporation is referred to as Italo or the Italo Corporation the Court means the Italo Corporation of America. At times the words is used merely to shorten the language.

That the defendants being Robert S. McKeon, Wilkes, Perata, Masoni, Tomassini, DeMaria, Siens, Westbrook, Shores, Shingle, Brown, Mikel and Jones should and they did, on or about June 1st, 1928, cause said stock to be issued to said Brownmoor Oil Company.

That the defendants should and they did cause application to be made to the Commissioner of Corporations of the State of California to distribute the said stock of the said Italo Petroleum Corporation of America which had been issued and delivered to the stockholders of Brownmoor Oil Company. That they should and they did, on the 19th day of June, 1928, apply for and receive a permit to distribute 575,000 shares of the common and the

same number of shares of preferred stock of the said Italo Petroleum Corporation to the stockholders of the said Brownmoor Oil Company. That the defendants should and they did on or about June 1st, 1928, and prior to the granting of the said permit to distribute the said stock, distribute 600,000 shares of common and 600,000 shares of preferred stock of Italo which was issued to the Brownmoor Oil Company as a part of the purchase price to themselves and some of the defendants, being Shingle, Brown, DeMaria, Mikel, Jones, Tommasini, Masoni, Perata, Shores, Westbrook and Wilkes, should and they did distribute some of the said stock to themselves and to Frederick Vincent and Fred Garvey for the use of themselves, they not being stockholders of Brownmoor Oil Company.

That the defendants should and they did on or about June 16, 1928, cause a certain syndicate to be formed, and defendants DeMaria, Masoni, John McKeon, Perata, Shingle, Brown, Mikel, Jones, Siens, Cavanaugh and Tommasini should and they did become members of such said syndicate, and some of the defendants being Masoni, Perata, Tommasini, DeMaria, Shores, Siens, Robert S. McKeon, Westbrook and Wilkes, who were then officers and directors of said Italo Corporation and dominating its activities, should and they did cause Italo to issue 6,000,000 shares of its capital stock for the benefit of the said syndicate, and in consideration therefor that Italo should, and it did, receive a sum not exceeding $3,500,000, and that defendants Siens, Masoni, Perata, Westbrook, Wilkes, DeMaria, Robert S. McKeon and Tommasini should wrongfully receive profits derived from the sale of the 6,000,000 shares of the stock without the

knowledge or consent of the persons to be defrauded who were stockholders of said Italo Corporation or should thereafter become such stockholders.

That some of the defendants, being Masoni, Perata, Tommasini, DeMaria, Shores, Siens, Robert S. McKeon, Westbrook, and Wilkes, while controlling the activities of the said Italo Corporation and while officers and directors of said corporation, should and they did, on or about July 5th, 1928, cause Italo to enter into an agreement with the McKeon Drilling Company, by which Italo should and it did agree to purchase certain assets of the McKeon Drilling Company, which agreement should and it did provide that Italo should and it did pay far in excess of the actual value of the said assets, and to issue and deliver to said McKeon Drilling Company as part of the consideration 4,500,000 shares of its capital stock.

That some of the defendants, being, Siens, Myers, Masoni, Perata, Westbrook, Wilkes, DeMaria and Robert S. McKeon should and they did have a secret agreement, by which they, the said defendants Siens, Myers, Masoni, Perata, Westbrook, Wilkes, DeMaria and Robert S. McKeon, should and they did receive back from the said McKeon Drilling Company 2,500,000 shares of the capital stock of the said Italo Corporation, without the consent or knowledge of the stockholders thereof.

That the defendants Siens, Myers, Masoni, Perata, Westbrook, Wilkes, DeMaria, and Robert S. McKeon should and they did sell and cause to be sold to the persons intended to be defrauded the said stocks so received by them under said secret agreement, and converted the proceeds of the sale to their own use.

That some of the defendants, being DeMaria, Masoni, R. S. McKeon, Perata, Shores, Siens, Tommasini, Westbrook and Wilkes should, and they did, apply to the Commissioner of Corporations for the State of California for a permit to issue stock of the said Italo Corporation for the purpose of acquiring properties of various companies, including McKeon Drilling Company, and the said defendants DeMaria, Tommasini, Masoni, R. S. McKeon, Perata, Shores, Siens, Westbrook and Wilkes, should and they did represent to the said Corporation Commissioner that the said Italo Corporation had agreed with McKeon Drilling Company to deliver 4,500,000 shares of its capital stock as part of the purchase price of the said McKeon Drilling Company assets, well knowing that McKeon Drilling Company was getting only 2,000,000 shares of the capital stock of the said Italo Corporation, and that defendants Wilkes, Perata, Masoni, DeMaria, Siens, Westbrook, Shores, John McKeon, Robert S. McKeon, Raleigh B. McKeon, Tommasini, Myers, Cavanaugh, Shingle, Brown, Jones and Mikel should and they did receive for their own use and benefit 2,500,000 shares of said stock.

That for the purpose of inducing the persons to buy stock of the said Italo Corporation, and to lead them to believe that they were purchasing stock in a company which was then and there operating at a profit, the defendants Wilkes, Perata, Masoni, DeMaria, Siens, Westbrook, Shores, John McKeon, Robert S. McKeon, Raleigh B. McKeon, Myers, Lyons, Cavanaugh, Shingle, Brown, Jones and Mikel should and they did pay dividends which should not be and were not paid from the net earnings, but were paid out of the capital of the said corporation.

That for the purpose of inducing the persons to be defrauded to part with their money and property they made certain false pretenses and statements by means of conversations, letters, circulars, and other printed matter which representations should be and were substantially:

First: that the McKeon Drilling Company was receiving 4,500,000 shares of the capital stock of the Italo Corporation as a part of its consideration for its properties by the said Italo Corporation, when in truth and in fact the said McKeon Drilling Company was receiving only 2,500,000 shares of the said Italo Corporation stock.

Two: That the said Italo Corporation was properly managed and it had made profitable acquisitions, when in fact such was not the case.

Third: That the said Italo Corporation undertook a sound development program, meaning the acquisition of the properties of the McKeon Drilling Company, when in fact the contract to purchase the properties of the said McKeon Drilling Company was not a sound development program.

Fourth: That one of the said Italo Corporations most important assets was the acquisition of the famous Trumble Petroleum Refining Patents, when in fact the said Italo Corporation had not acquired, and never did acquire, the said Trumble Refining Patents.

Fifth: That the securities of the said Italo Corporation had been established as one of the soundest investments, when in truth and in fact they were not a sound investment at all.

And that the defendants, for the purpose of executing the said scheme, unlawfully and knowingly placed in the

United States Post Office at San Francisco, and caused to be delivered by the Post Office establishment of the United States at Los Angeles, an envelope addressed to Rasmus H. Anderson, containing a circular, which circular is dated August 16, 1929.

This circular, you will remember, was ordered stricken out by the Court, and is removed from your consideration, and you are instructed that it's mailing does not constitute an offense under the indictment.

The second count of the indictment charges that the defendants on or about March 9th, 1929, for the purpose of executing the scheme described, placed in the United States Post Office at San Francisco, a post paid envelope addressed to Grace E. Dennison, at Los Angeles, containing a circular dated March 8, 1929, and which has been admitted in evidence as Exhibit No. 268.

The third count of the indictment charges that the defendants on or about the 13th day of December, 1928, for the purpose of executing the scheme described, placed in the United States Post Office at San Francisco, a post paid envelope addressed to George J. Geis, at Los Angeles, containing a certain circular dated December 12, 1928, and which has been admitted in evidence as Exhibit No. 267.

The fourth count of the indictment has been stricken out, and you are instructed that the same is removed entirely from your consideration.

The fifth count of the indictment has also been stricken out, and you are instructed that the same is removed entirely from your consideration.

The sixth count of the indictment charges that the defendants on or about the 9th day of March, 1929, for the purpose of executing the scheme described, placed in the United States Post Office at San Francisco, a post paid envelope addressed to Mary E. Hill and La Vinna Hill Hopkins at Pasadena, containing a certain circular dated March 8, 1929, and which has been admitted in evidence as Exhibit No. 269.

The seventh count of the indictment charges that the defendants on or about the 17th day of August, 1929, for the purpose of executing the scheme described, placed in the United States Post Office at San Francisco a post paid envelope addressed to La Vinna Hill Hopkins, at Pasadena, containing a certain circular dated August 16, 1929, and which has been admitted in evidence as Exhibit No. 75.

The eighth count of the indictment charges that the defendants on or about the 12th day of August, 1929, for the purpose of executing the scheme described, placed in the United States Post Office at San Francisco, a post paid envelope addressed to La Vinna Hill Hopkins, at Pasadena, containing a certain circular, and which has been admitted in evidence as Exhibit No. 47.

The ninth count of the indictment has been stricken out, and you are instructed that the same is removed entirely from your consideration.

No evidence has been presented in support of the tenth count, and you are instructed that the tenth count of the indictment is therefore removed from your consideration.

The eleventh count of the indictment charges that the defendants on or about the 1st day of February, 1929,

for the purpose of executing the scheme described, placed in the United States Post Office at San Francisco a post paid envelope addressed to Mrs. Emma Riniker, at Los Angeles, containing a certain circular and which has been admitted in evidence as Exhibit No. 49.

The twelfth count of the indictment charges that the defendants on or about the 23rd day of January, 1929, for the purpose of executing the scheme described placed in the United States Post Office at San Francisco, a post paid envelope addressed to O. J. Rhode at Los Angeles, containing a certain letter dated January 23, 1929, and which has been admitted in evidence as Exhibit No. 234.

The thirteenth count of the indictment charges that the defendants on or about the 10th day of July, 1929, for the purpose of executing the scheme described, placed in the United States Post Office at San Francisco, a post paid envelope addressed to O. J. Rhode at Los Angeles, containing a certain circular dated July 10, 1929, and which has been admitted in evidence as Exhibit No. 235.

The fourteenth count of the indictment charges that the defendants on or about the 7th day of October, 1929, for the purpose of executing the scheme described, placed in the United States Post Office at Los Angeles, a post paid envelope addressed to Leo Willman at Pasadena, containing a certain letter dated October 7, 1929, and which has been admitted in evidence as Exhibit No. 50.

The fifteenth count will be made the subject of a separate instruction hereafter.

I have deemed it necessary, gentlemen, to recite the contents of the indictment at considerable length, because to a certain extent it is affected by the Bill of Particulars

furnished by the Government, and for the purpose of clarifying the charge and the persons involved it has been given to you at length.

The indictment has been explained to you as it was originally filed, and amplified by the Bill of Particulars furnished by the Government.

Defendant Mikel has not been placed on trial due to illness.

The entire case has been dismissed as to defendants DeMaria, Tommasini and Lyons, so that the defendants now on trial are Alfred G. Wilkes, E. Byron Siens, Maurice C. Myers, John M. Perata. Paul Masoni. James V. Westbrook, Howard Shores, John McKeon, Robert S. McKeon, Raleigh B. McKeon, Fred Shingle, Horace J. Brown, Axton F. Jones.

Counts one, four, five, nine and ten of the indictment have been heretofore dismissed, so there remains counts two, three, six, seven, eight, eleven, twelve, thirteen, fourteen and fifteen, upon which alone you can find any of the defendants guilty.

The Statute involved in the first nine counts of the indictment as it now stands provides: "That whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises,—shall, for the purpose of executing such scheme or artifice, or attempting so to do, place, or cause to be placed any letter, postal card, package, writing, circular, pamphlet, or advertisement,—in any Post Office —to be sent or delivered by the Post Office establishment,—or shall knowingly cause to be delivered by mail

according to the direction thereon any such letter, postal card, package, writing, circular, pamphlet, or advertisement—" shall be guilty of an offense.

The Government of the United States has not authority to punish fraudulent schemes perpetrated within the State as such. That is ordinarily the duty of the State Authorities. It can, and it does say, however, that the Postal System of the United States shall not be used in aid of any dishonest or fraudulent scheme. It therefore has provided in this Statute that the United States Postal System, serving as it does, legitimate business, social intercourse, and the beneficial interests of the public, shall not be turned into an agency by which designing or dishonest persons may impose on the public any fraudulent practices.

You will notice from the words of the Statute that the person guilty of its violation must first devise or intend to devise a scheme or artifice to defraud or to obtain money or property by means of false or fraudulent pretenses, representations, or promises; and secondly, for the purpose of executing such scheme or artifice or attempting so to do, place or cause to be placed any letter, circular, or advertisement in the Post Office to be sent or delivered by the Post Office establishment.

I will instruct you at this time that it is not at all necessary that the scheme or artifice, if such there be, was successful. It is not necessary that the Government prove that anyone was actually defrauded thereby. You must, however, at all times bear in mind that the fraudulent acts such as I have described, however flagrant they may be, are not punishable under the United States Statutes, unless they also involve as a means of carrying them into

effect or of attempting to do so the use of the United States Mails. The mails must have been used with the intent and purpose of executing this scheme to defraud, if any there was. It is not sufficient that the mails were used before the scheme was devised, if one was devised. It is not sufficient that the mails were used after the scheme was executed, if you find there was a scheme executed. The gist of the offense is the misuse of the mails.

You are instructed that the matter which you may find to have been mailed need not show on its face that it was in furtherance of the scheme, but it must have some relation to it, and must be a step in the attempted execution of the scheme and be mailed with the intent to aid in its execution, it is enough if, having devised the scheme to defraud, a defendant, with a view of executing it, deposited or caused to be deposited in the post office letters which he thought might assist in carrying it into effect. If you find that the letters were sent through the mails for the purpose of allaying discontent, restoring confidence, or stimulating active support and so forth for the enterprise of the defendants, then you will find that the mailing of such letters comes within the provisions of Section 215 of the Federal Penal Code, being that which I have cited to you in substance.

As you have heretofore been advised the letters, circulars, and other matter placed in the United States Mails must have, following the language of the statute, served the purpose of the defendants of executing the scheme or artifice or attempting so to do. If its effect was to further the scheme or artifice, or if the defendants intended that it should serve such purpose, whether or not it actually did, it comes within the statute. You will therefore

examine each of the documents described in each of the counts, and unless you find beyond a reasonable doubt that the document mailed served to further the scheme, or that defendants intended that it should, you may not convict any of the defendants with respect to such counts. If, however, you do so find beyond a reasonable doubt, then it is your duty to convict the defendants participating therein.

As you have been advised the success or failure of the scheme is not material. Neither is it necessary that the evidence show that anyone was defrauded. If you find from the testimony introduced in this case that the letters in question passed through the mails, and that they were placed in the mails by the agents or clerks of the defendants acting within the scope of their employment and in the usual course of business, the defendants caused the letters to be placed in a post office to be sent or delivered, within the meaning of the mail fraud statute. The fact of mailing and by whom may be proved by circumstantial evidence. It is not essential that the Government prove each and every false statement, representation, or pretense alleged to have been made or intended to be made, as described in the indictment, but it is essential that proof be made that the defendants did devise a scheme to defraud of substantially the kind and character alleged, and that they employed one or more of the false or fraudulent representations or pretenses alleged, and in furtherance of such scheme used the United States Mails in the manner alleged in the indictment. It is the law that not only the persons who directly committed acts constituting an offense against the laws of the United States are held guilty, but every person who knowingly aids, abets, counsels, com-

mands, induces, or procures the commission of any such criminal act is equally guilty with the principal. So in this case, if you should find that certain of the defendants directly committed acts constituting the crimes charged in the indictment, and that other of the defendants actively and knowingly aided and abetted in the commission of such crimes, then such other defendants would be equally guilty with the principal or principals.

You are instructed that the indictment in this case, although returned by the grand jury is no evidence of the guilt of the defendants. The indictment is merely the method adopted by the Government for making the accusations or charges against the defendants, and is not to be considered by you as in any way proving or tending to prove any of the issues in the case. You are further instructed as a matter of law that the only offense before you for consideration, the only offenses are those alleged in the indictment. The defendants are not on trial for any offense not charged in the indictment in this case, and you may not convict them of any charge in the indictment in this case simply because you may believe, if you do so believe, that they or any of them have been guilty of some other crime or wrong not charged in the indictment.

The first fundamental question that you should determine in this case is: Was there in fact a scheme to defraud substantially as charged in the indictment. If you answer that question in the negative, you are at an end of the case, and your verdict must be not guilty. If, on the other hand, you answer that question in the affirmative, you should then determine the question whether these defendants or any of them actively or consciously participated and entered into such scheme, or although not di-

rectly participating, knowingly aided or abetted the same. You are then to determine whether or not one or more of the letters, circulars, or other documents described in the indictment, was mailed with the intent to carry out such scheme. In deciding the issues in this case you should take into consideration all the evidence admitted in the case, both for the United States and for the defendants. So, also, if you should find that there is want of evidence upon any material issue, you should take that fact into consideration in arriving at your verdict.

A defendant is presumed to be innocent at all stages of the proceedings until the evidence introduced upon behalf of the prosecution shows him to be guilty beyond a reasonable, doubt. This rule applies to every material element of the offense charged. The burden of the proof is upon the Government in this case to show the guilt of each defendant beyond a reasonable doubt, and all the presumptions of law, independent of evidence, are in favor of the innocence of each defendant. And in this case I instruct you that if after you have considered all of the evidence in this case, then you have a reasonable doubt as to the guilt of the defendants or any defendant, then such defendant as to whom you have such a reasonable doubt is entitled to the benefit of that doubt, and you should acquit him. Mere suspicion will not authorize a conviction as to any defendant, and whenever after a careful consideration of all of the evidence, your minds are in that state where a conclusion of innocence is indicated equally with a conclusion of guilt, or where there is reasonable doubt as to whether the evidence is so balanced, the conclusion of innocence should be adopted. To justify you in returning a verdict of guilty the evidence must be of such a character

as to satisfy your judgment to the exclusion of every reasonable doubt. If, therefore, you can reconcile the evidence with any reasonable hypothesis consistent with the defendants' innocence, it is your duty to do so, and in that case find the defendants not guilty. And if, after weighing all the proofs and looking only to the proofs, you impartially and honestly entertain the belief that the defendants may be innocent of the offenses charged against them, they are entitled to the benefit of that doubt, and you should acquit them. It is not meant by this that the proof should establish their guilt to an absolute certainty, but merely that you should not convict them unless from all of the evidence you believe the defendants are guilty beyond a reasonable doubt. Speculative notions or possibilities resting upon mere conjecture, not arising or deducible from the proof, or the want of it, should not be confounded with a reasonable doubt. A doubt suggested by the ingenuity of counsel, or your own ingenity, not legitimately warranted by the evidence or the want of it, or one born of a merciful inclination to permit the defendants to escape the penalty of the law, or one prompted by sympathy for them or those connected with them is not what is meant by a reasonable doubt. A reasonable doubt, as that term is employed in the administration of the criminal law, is an honest substantial misgiving generated by the proof or want of it. It is such a state of the proof as fails to convince your judgment and conscience and satisfy your reason as to the guilt of the accused. If the whole of the evidence when carefully examined, weighed, compared, and considered produces in your minds a settled conviction or belief of the defendants' guilt—such an abiding convic-

tion as you would be willing to act upon in the most weighty and important affairs in your own life—you may be said to be free from any reasonable doubt, and should find a verdict in accordance with that conviction or belief.

The presumption of innocence in this case means that the law presumes that the defendants did not devise a scheme to defraud, as charged in the indictment, and this presumption as so explained to you continues during the entire trial of the case and also to be considered during the consideration of the case by the jurors in the jury room. Such presumption of innocence has of itself a sufficient force to require the jurors to find the defendants not guilty, unless the jurors after fairly and fully considering all of the evidence in the case are convinced beyond all reasonable doubt that the defendants are guilty in the manner and form charged in the indictment.

All witnesses are presumed to speak the truth while on the witness stand. This presumption, however, is a disputable one, and may be repelled by the manner in which your witness testifies, by his reputation for truth and integrity, by the probability of his testimony and to the extent to which it is corroborated by known facts in the case, or by his sympathies with either side of the case and the extent to which, either favorably or adversely he might be affected by the result. If a witness has knowingly given false testimony upon a material matter in the case, the jury is at liberty to distrust his testimony in other respects, even to the extent of rejecting the whole of his testimony. These principles apply to the defendant when testifying as a witness in his own behalf and to all other witnesses, and the jury may well

bear in mind in weighing the testimony of the defendant, the extent to which he may be affected by the result of the trial; and the defendant in a criminal case is not obliged to become a witness in his own behalf, and no inference of guilt can be drawn by the jury because any defendant has not testified at this trial. In the Federal courts there is no presumption that the accused is of good character. Neither can he be presumed to be of bad character, but if the good character of the person accused of crime is proven for the traits of character involved in the charges against him and in the case on trial, it must be considered by you in connection with all of the other facts and circumstances brought out by evidence admitted on this trial, and, if after such consideration, the jury is not satisfied beyond a reasonable doubt of the defendant's guilt of the offense for which he is being tried, they should acquit him. But if they are satisfied from all the evidence in the case that the defendant is guilty of the charge for which he is being tried, you should convict him notwithstanding his proof of good character.

The selling of the stock in the Italo Petroleum Corporation of America or in the Italo-American Petroleum Corporation, which has been referred to in the evidence in this case, in itself is a proper and legal business, unless the jury finds from the evidence that the defendants in this case sold or attempted to sell the stock in question in bad faith and with the intent on their part to defraud purchasers and prospective purchasers of such stock and find such evidence beyond a reasonable doubt. It is immaterial how confident a defendant may have been that the concerns or organizations whose shares of stock he was

selling and offering for sale to the public would ultimately succeed in business as represented or stated by the defendant, and it is immaterial as to what degree of success was later on attained by such organizations or concerns, if the alleged false representations were made for the purpose of getting money from persons purchasing said shares of stock, and such representations were not true, and such defendant knew at the time that he made them that they were not true. No matter how seemingly fair and honest the scheme may appear, if the purpose of it is to defraud, it is within the statute prohibiting the unlawful use of the mails as alleged in the indictment.

Actual fraud as defined by the law of the state is the suggestion as a fact of that which is not true by one who does not believe it to be true; the positive assertion in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true; the suppression of that which is true by one having knowledge or belief of the facts and who is under obligation to reveal it; a promise made without any intention of performing it; and any other act committed to deceive. The intent to defraud must exist at all times.

You are instructed that a false promise, such as the statute describes, is a promise—not merely one that is not fulfilled, but a promise that the defendants knew at the time it was made would not be fulfilled, or else a promise that is impossible of performance. That, however, must be considered with reference to the definition of actual fraud that I have just given to you.

Merely because a promise is made and not kept would not warrant you in concluding that the party making that promise had a criminal intent, or warrant you in finding

him guilty because you may believe he made a promise which was not fulfilled.

Fraud is never presumed, and the burden is upon the person claiming fraud to prove it to your satisfaction by competent evidence beyond all reasonable doubt. In the absence of such evidence you are to presume that the defendants were innocent of any wrongful act or fraudulent conduct.

While it is true that a man is presumed to intend the probable and natural consequences of his own acts, wilfully and intentionally done, yet this presumption is a rebuttable one and may be repelled by other facts and circumstances in the case and should be taken into consideration by you in connection with all the facts and circumstances of this case. The Government must establish that the necessary effect of carrying the scheme mentioned in the indictment into effect was to defraud the persons of their money or property, and that the defendants knew that such would necessarily be the effect.

The good faith of the defendants and each of them, or their bad faith in these matters is to be determined and their several acts and declarations construed and interpreted by the conditions existing at the time the statements were made, as they appeared to them at the time and not by the final result of the enterprise or their present condition or situation.

You, as reasonable and honest men, should endeavor to put yourself in the position of each defendant at the time the matters complained of by the Government are alleged to have occurred to the end that you may determine whether or not the defendants under consideration were

acting in good faith or with a fraudulent intent and purpose.

I desire to add to that suggestion: It is right and proper that the acts of the defendants should be viewed from, or rather, with reference to the conditions as existing at that time. It is also right and proper and incumbent upon the jury to remember, particularly so far as the written evidence is concerned, that it was done contemporaneously with the acts; that is to say, it is done at the same time and at a time when, so far as the evidence in the case shows, there was no likelihood, certainty at least, other than what the law itself imposes, that the acts would be questioned.

The jury may well bear in mind in interpreting the documents any inference to be drawn from the documents in evidence, that they were contemporaneous acts. The jury is not either to be influenced by the lapse of time, so far as the lawfulness of these acts are concerned. Frequently throughout the case and particularly with reference to the memory of some of the witnesses it was stated that this happened five years ago. Now, that must be taken into account. It will not, however, have any effect upon your judgment to the end that the lapse of time has tolled the demands of the law. In other words, if the act was illegal at that time, it must be so deemed illegal now.

The defendants are not on trial for evolving or devising any improvident or impracticable scheme, even though you believe the plan to have been such. They are not on trial for errors of judgment. They are on trial for a criminal offense. An essential element of that offense is an evil

or criminal intent which it is incumbent upon the Government to prove to your satisfaction beyond all reasonable doubt.

You are instructed that all of the evidence that has been received in this case is not applicable to all of the defendants. Only such evidence as tends directly to connect a particular defendant with the offense charged in the indictment can be considered by you in determining the guilt of that defendant.

The mere fact that a defendant is an officer of a corporation does not in any manner render him responsible criminally for the acts of that corporation, as there can be no implied criminal responsibility; nor does the fact of a defendant being an officer of the corporation render him in anywise criminally responsible for the act of any other officer or of any other agent or employee of the corporation. In each instance it must be proven that such defendant himself performed the acts in question or directed their performance and that he had guilty knowledge and intent which you have been instructed must have been present before such defendant can be held to be guilty with respect to such acts.

You are therefore instructed to acquit or convict any defendant as to any count without reference to any other defendant. Each defendant stands wholly by himself when you come to judge the evidence on each count.

With respect to the books of account and other records of the various corporations concerning which testimony has been admitted, you are instructed that the mere fact that a defendant is an officer, a director, or employee of such corporation does not make such books in anywise

admissible as to him. Before any entry in such books can be considered by you in determining the guilt of any defendant it must first be proven to you beyond all reasonable doubt that such defendant made or caused to be made that particular entry, or that it was made with his knowledge and under his supervision. Unless you so find no entry in the books of account can be considered by you in any manner as proving or tending to prove the guilt of any defendant.

Some of the defendants have testified that they did not know the contents of the books and records of any of the corporations involved in this prosecution, and in this connection you are instructed that if you find from the evidence that such defendants dominated and controlled and had access to the books and records of such concern or concerns, and that such books and records were kept under their direction, you may infer that they had knowledge of the contents thereof for everyone who is in control of an organization and has the right of access to its books and records and under whose direction such books and records are kept is charged with knowledge of their contents.

A corporation engaged solely or substantially in the exploitation of mines, oil wells, gas wells, or other wasting assets may distribute the net income derived from the exploitation of such wasting assets without making any deduction or allowance for the depletion of such assets incidental to the lapse of time, consumption, liquidation, or exploitation; subject, however, to adequate provision for meeting liabilities and fixed preferences of outstanding shares as to the assets on liquidation, and to notice

to stockholders that no deduction or allowance has been made for such depletion.

The law does not require any defendant to prove his innocence, which in many cases might be impossible, but on the contrary, the law requires the Government to establish his guilt and that by legal evidence and beyond a reasonable doubt.

Where a conviction of a criminal offense is sought upon circumstantial evidence, the prosecution must not only show by evidence beyond a reasonable doubt that the alleged facts and circumstances are true, but they must be such facts and circumstances as are incompatible upon any reasonable hypothesis with the innocence of the accused and incapable of explanation upon any reasonable hypothesis other than that of the guilt of the accused before a verdict of guilty can be found. Guilty knowledge cannot be presumed, nor can an officer of the corporation be held to be bound by knowledge of such fact upon the theory that he ought to have known the circumstances of such facts in the course of the business. Such presumption cannot be indulged in a criminal case, but it must be shown that he had knowledge of the actual fraud sought to be perpetrated, if there was such plan or scheme to perpetrate such fraud, and that having such knowledge he placed or caused to be placed a letter in the mails, as aforesaid, in furtherance of such scheme.

Fraud, however, is rarely susceptible of direct proof. It must ordinarily be established by circumstantial evidence, and legitimate inference arising therefrom which, taken as a whole, will show the fraudulent intent or purpose with which the party has acted. The inferences to

be gathered from a chain of circumstances depend largely upon the common sense knowledge of the motives and intentions of men under like circumstances. While fraud and even intent cannot be proved by mere suspicion, it may be established by such facts and circumstances from which reasonable men would infer that the transaction was fraudulent.

It is the right of any person or corporation to use any device to avoid the burden of revenue acts, provided the same is effectuated by legal means. You are further instructed that directors and officers of corporations are required to exercise their powers in good faith and with a view to the interests of the corporation. However, no contract or other transaction between a corporation and any corporation, firm, or association in which one or more of its directors are directors or are substantially interested, is either void, voidable or fraudulent, by reason of the mere fact that such director or directors were or are present at the meeting of the board of directors which authorizes or approves such contract or transaction, or by reason merely of the fact that the directors or officers negotiated the contract or was interested therein, or by reason merely of the fact that his or their votes were counted for that purpose of authorizing or approving such contract or transaction. If the fact of such participation shall be disclosed, that is to say, it is not unlawful if these things follow—if the fact of such participation be disclosed or known to the directors and noted in the minutes, and the board shall authorize, approve, or ratify such contract or transaction in good faith by vote sufficient for such purpose without counting the

vote or votes of such director or directors. Or, if the fact of such *par*-participation shall be disclosed or known to the stockholders, and they approve or ratify such contracts or transaction in good faith by majority vote of holders of shares entitled to vote. Or if the contract or transaction is, as to the corporation, just and reasonable at the time it is authorized and approved, then any such director or directors may be counted in determining the presence of a quorum at such meeting.

You are advised that a director of a corporation occupies a fiduciary relationship to the corporation and to the stockholders. His position is one of trust, and he is frequently denominated a trustee. He is bound to act with fidelity, the utmost good faith, and with his private and personal interests subordinated to his trust duty whenever the two come into conflict. The same is true of its officers and of all other persons who dominate and control the affairs of the corporation. They must at all times deal fairly with those who own or are invited to purchase shares of the corporation and must fairly disclose all facts which might influence them in deciding upon the value and wisdom of purchasing the stock in such corporation.

Directors and officers must exercise their powers in good faith and with a view to the interest of the corporation. By the acceptance of office they preclude themselves from doing any act or engaging in any transaction in which their private interests conflict with the duty they owe to the stockholders and from securing to themselves or to others an advantage not common to all the stockholders. This applies, of course, only to their

acts relating to the property or business or management of the corporation.

While it is true that a contract between a corporation and one or more of its directors is not void or fraudulent, provided the interest of the director is known to the corporation; directors, or other officers are forbidden to make any profit by selling any property to the corporation of which they are directors or officers without making the fullest disclosure not only to the board of directors of such corporation, but also to those who are solicited to purchase the shares thereof. Directors and officers stand in a trust relation to the company and are bound at all times to act faithfully in the interests of the company and of the stockholders and proposed stockholders. To make any undisclosed profit for himself is fraudulent on the part of a director and to solicit the public to purchase shares without fully informing them of such profit to himself is a fraud upon them.

There is evidence in this case which, if believed by you beyond a reasonable doubt, will justify a finding that after the organizing of the Italo Petroleum Corporation of America some of the officers effected certain mergers and transferred to the Italo Corporation of America the assets and property of other corporations at a profit to themselves personally without disclosing such fact to those who had bought and were being invited to buy stock therein. It is for you to determine beyond a reasonable doubt from the evidence in the case whether or not this is the fact, and if you so find it to be a fact, you would be warranted in finding that any defendant so doing did participate in the scheme and artifice to defraud described in the indictment.

It is not unlawful that directors of a corporation have an interest in property sold to the corporation and receive part of the consideration therefor, even without disclosing such interest to the corporation, provided the transaction as to the corporation is just and reasonable. Directors, however, are forbidden from making any secret profits out of their relation. It is immaterial that the corporation has not been damaged by the transaction; secret profits belong to the corporation for the benefit of its stockholders and directors are under a duty, if they sell to the corporation, to make the sale without a profit unless they disclose that they are receiving such profit and the fact that the property at the time was worth the purchase price, it in no way relieves the directors of the duties and responsibilities resting upon them as fiduciaries.

Let me illustrate this matter of secret profits. A prominent business man, I know him well, was President and a member of the board of directors of a life insurance company recently organized, the stock of which had not been sold. The company entered into a contract with a firm of brokers for the sale of the stock for a percentage. The President of the corporation made a secret agreement with the brokers by which he received a percentage of the amount earned by the brokers aggregating some $40,000. Learning of the secret agreement the corporation brought suit for recovery of this sum as secret profits. The defense was made that the services rendered by the President were worth the amount; that he had resigned a lucrative position with another firm to assist the sale of the stock; that his services were necessary in order to effectuate the sales.

It was held that the duty of securing the subscriptions was one enjoined by the law upon the directors and that no director could lawfully make any secret profit in the matter of such subscriptions. That by making the secret agreement with the broker he acquired an interest that was possibly adverse to his fiduciary duty and he secretly placed himself in a position that was hostile to the interests that he was bound to protect as an officer of the corporation and in a position where conflict might arise between his trust duty and his personal interests. So that is the law regarding the fiduciary duty, and you will observe in the course of these instructions that he is not permitted to occupy a position where he makes profits that are not disclosed to those whose interests he is bound to protect. In this particular case that claim was established and was paid from the estate long after his death.

In the fifteenth count of the indictment the defendants are charged with having knowingly and wilfully conspired and agreed among themselves and with each other and with other persons, to the grand jurors unknown, to commit certain offenses against the United States, being to devise a scheme and artifice to defraud and to obtain money and property by false and fraudulent pretenses from the persons named in the first count of the indictment as the persons to be defrauded and that for the purpose of executing such scheme to place and cause to be placed in the United States Post Office letters, circulars, and other mail matter addressed to various and sundry persons whose names other than stated in the first fourteen counts of the indictment are unknown to the grand jurors and that in furtherance of and for the purpose of carrying out and effecting the object of

said conspiracy, committed fourteen certain overt acts described on pages 28 to 36 of the indictment.

The law under which the indictment in this case is drawn provides that if two or more persons conspire to commit any offense against the United States, and one or more of them does any act to effect the object of the conspiracy, each of the parties to such conspiracy is guilty.

In order to establish the crime charged, it is necessary, first, that the conspiracy or agreement to commit the particular offense against the United States as alleged in the 15th count of the indictment be established, and secondly, to prove further that one or more of the parties engaging in the conspiracy has committed some act to effect the object thereof.

To constitute a conspiracy it is not necessary that two or more persons should meet together and enter into an express or formal agreement for the unlawful venture or scheme, or that they should directly, by words or in writing, state between themselves or otherwise what the unlawful plan or scheme is to be, or the details thereof, or the means by which the unlawful combination is to be made effective. It is sufficient if two or more persons, in any manner, or through any contrivance, positively or tacitly come to a mutual understanding to accomplish a common and unlawful design. In other words, when an unlawful end is sought to be effected, and two or more persons, actuated by the common purpose of accomplishing that end, work together in any way in furtherance of the unlawful scheme, every one of said persons becomes a member of the conspiracy. The suc-

cess or failure of the conspiracy is immaterial, but before the defendants may be found guilty of the charge it must appear beyond a reasonable doubt that a conspiracy was formed as alleged in the 15th count of the indictment, and that the defendants were active parties thereto.

In order to warrant you in finding a verdict of guilty against the defendants, or any of them, it is necessary that you be satisfied beyond a reasonable doubt that a conspiracy as charged in the 15th count of the indictment was entered into between two or more of the defendants to violate the law of the United States in the manner described in the indictment. It is necessary further that, in addition to the showing of the unlawful conspiracy or agreement, the Government prove to your satisfaction, beyond a reasonable doubt, that one or more of the overt acts described in the indictment was done by one or more of the defendants or at their direction or with their aid.

Under the charge made the conspiracy constitutes the offense and it must be made to appear from the evidence, beyond a reasonable doubt, before any defendant can be convicted, that such a defendant was a party to the conspiracy and unlawful agreement charged, and that he continued to be such up to the time that overt acts were committed, if the evidence shows that there were any such. The mere fact that either or any of the defendants named may have engaged in the performance of any of the acts charged in the indictment as overt acts, would not authorize a conviction by reason of that fact alone, but it is necessary to show that such defendant or defendants were parties to the conspiracy and unlawful

agreement before their guilt of the offense charged is made out.

Each party must be actuated by an intent to promote the common design. If persons pursue by their acts the same unlawful object, one performing one act, and a second another act, all with a view to the attainment of the object they are pursuing, the conclusion is warranted that they are engaged in a conspiracy to effect that object. Cooperation in some form must be shown. There must be intentional participation in the transaction with a view and purpose to further the common design. And if a person, understanding the unlawful character of a transaction, encourages, advises, or in any manner, with a purpose to forward the enterprise or scheme, assists in its prosecution, he becomes a conspirator. And so a new party, coming into a conspiracy after its inception, with knowledge of its purpose and object, and with intent to promote the same, becomes a party to all of the acts done before his introduction into the unlawful combination, as well as to the acts done afterwards. Joint assent and joint participation in the conspiracy may be found, like any other fact, as an inference from facts proved.

Where the existence of a criminal conspiracy has been shown, every act or declaration of each member of such conspiracy, done or made thereafter pursuant to the concerted plan and in furtherance of the common object, is considered the act and declaration of all of the conspirators and is evidence against each of them. On the other hand, after a conspiracy has come to an end, either by the accomplishment of the common design, or by the

parties abandoning the same, evidence of acts or declarations thereafter made by any of the conspirators can be considered only as against the person doing such acts or making such statements. The declaration or act of a conspirator not in execution of the common design is not evidence against any of the parties other than the one making such declaration.

The evidence in proof of the conspiracy may be circumstantial. Where circumstantial evidence is relied upon to establish the conspiracy or any other essential fact, it is not only necessary that all the circumstances concur to show the existence of the conspiracy or fact sought to be proved, but such circumstantial evidence must be inconsistent with any other rational conclusion. That is, you are to consider all of the circumstances and conditions shown in evidence, and if it appears to you as reasonable men that, even though there is no direct evidence of the actual participation in the alleged offense by the defendants or either of them, a reasonable inference from all of the facts and circumstances does to your minds, beyond a reasonable doubt, show that the defendants, or some of them, were parties to the conspiracy as charged, then you should make the deduction and find accordingly.

It is not necessary that it be shown that any person concerned in the alleged conspiracy profited by the things which he did, but if any of the defendants with knowledge that the law was designed to be violated in the particular manner charged in the indictment, aided in any way by affirmative action in the accomplishment of the unlawful act, he would be guilty. To this statement there is one exception, and that is, if before any overt act has been committed upon the part of any conspirator or at his

suggestion or with his aid or participation, any such conspirator withdraws from the project or the carrying out thereof, he ceases to be a conspirator and is without guilt.

Under the Federal practice a defendant or defendants may be convicted upon the uncontradicted testimony of an accomplice. That is, the testimony of a person who has participated in the acts charged constituting the offense. The testimony of an accomplice, however, is to be closely scrutinized and viewed with distrust in all the circumstances under which one who was an accomplice has testified his interest in the case, his demeanor and manner upon the witness stand, and the extent by which he may be affected by the verdict. All must be carefully considered.

Gentlemen, you are to sit in this case and judge of the rights of these parties impartially and free from any bias or prejudice whatsoever coming from any outside source. You are not to be swayed in your consideration of this case by bias, prejudice, or passion in the determination of the evidence and in your finding as to the guilt or innocence of these defendants. If you have received any impression from publications in the press or from popular sentiment as to the rights of the defendants, or any of them, those things are to be absolutely eliminated from your consideration. You are to determine this case from the evidence and upon the evidence alone, and if you are satisfied beyond a reasonable doubt of the guilt of the defendants, or any of them, you will be derelict in your duty unless you so express it in your verdict.

Are there exceptions to the charge upon behalf of the defendants?

Thereupon and in accordance with Rule 47 of the Rules of Practice of the United States District Court for the Southern District of California defendants excepted to the failure and refusal of the court to give the following numbered instructions requested by the defendants upon the grounds that said instructions were true and correct statements of the law and were not covered by instructions given by the court to the jury:

We except to the refusal of the court to give the following numbered instructions requested by the defendants for the reason that the matters therein suggested are a proper statement of the law and have not been by the court fully covered or presented to the jury in its given instructions and such instructions relate directly to the questions to be determined by the jury and are necessary to properly aid them in their determination of the questions submitted for their consideration:

No. XXII. You are instructed that a bill of particulars has been furnished to the defendants in this case, by order of this court. The purpose of a bill of particulars is to advise the court, and more particularly the defendants, of what facts, in more or less detail, the defendants will be required to meet upon the trial of a case, and the Government is limited in its evidence to those facts so set forth in the bill of particulars, as having been done or committed by any particular defendant. When furnished a bill of particulars it concludes the rights of all parties to be affected by it, and the Government in this case must be and is confined to the

particulars they have specified in the bill of particulars as having been done or said by any of the particular defendants. The mere fact, however, that the Government states in the bill of particulars that any particular defendant or defendants did engage in any of the transactions therein alleged is not to be considered by you as any evidence whatsoever that such defendant or defendants did engage in such transaction; but it must be proven by the evidence to your satisfaction beyond a reasonable doubt that such defendant did knowingly participate in such transaction.

However, the Government is limited and restricted in its evidence to the particulars specified in the bill of particulars and is not permitted to prove that any defendant or defendants not named in the bill of particulars as having engaged in a particular transaction did engage therein. In other words, the effect of the bill of particulars in this regard, is that the government says that under the evidence the particular defendant did not engage in the particular transaction not specified as having been engaged in by him.

U. S. v. Gouled, et al. 253 F. 239

U. S. v. Adams Express Co. 119 F. 240

Commonwealth v. Giles, 1 Gray (Mass.) 466.

Dunlap v. United States, 165 U. S. 486, [41 L. ed. 799.].

No. *1.* You are instructed that there is no evidence in this case, that the defendants, Fred Shingle, Horace J. Brown, or Axton F. Jones, or either or any of them, had knowledge of, or participated in the organizing of the Italo American Petroleum Corporation, or participated

in the issuing, or selling, of the capital stock of the said Italo American Petroleum Corporation."

No. II. You are instructed that there is no evidence in this case that the defendants, Fred Shingle, Horace J. Brown, or Axton F. Jones, or either or any of them, organized, or caused the organization of, the Italo Petroleum Corporation of America, or that they issued, or caused to be issued, the capital stock of the said Italo Petroleum Corporation of America."

No. III. You are instructed, as a matter of law, that the management of the business affairs of a corporation is vested in the Board of Directors thereof.

Sec. 9 of General Corporations Laws of the State of Delaware.

Calif. Civil Code, Sec. 305, 290, superseded by the amendment of 1931 contained in Civil Code Sec. 305.

There is no evidence in this case, that the defendants, Fred Shingle, Horace J. Brown, or Axton F. Jones, or either or any of them, dominated or controlled the activities or conduct or business of the Italo American Petroleum Corporation or the Italo Petroleum Corporation of America; nor is there any evidence that they or either or any of them were officers or directors of either of said corporations. It is admitted in this case that they were not officers or directors of either of said corporations.

No. IV. You are instructed that there is no evidence in this case that the defendants, Fred Shingle, Horace J. Brown, or Axton F. Jones, or either, or any of them, on or about May 16, 1928, loaned to the Italo Petroleum

Corporation of America the sum of $80,000; nor is there any evidence that they, or either of them, received, from the Italo Petroleum Corporation of America, a bonus for the making of a loan of $80,000 to the said Italo Petroleum Corporation of America."

No. V. You are instructed that there is no evidence in this case that the defendants, Fred Shingle, Horace J. Brown, or Axton F. Jones, or either or any of them, caused the Italo Petroleum Corporation of America to enter into an agreement for the purchase of the assets of the Brownmoor Oil Company. There is no evidence that they knew what the terms or provisions were that were to be contained in any agreement between the said Italo Petroleum Corporation of America and the said Brownmoor Oil Company or what consideration the Italo Petroleum Corporation of America agreed to pay for the assets of the Brownmoor Oil Company.

No. VI. You are instructed that there is no evidence in this case that the defendants Fred Shingle, Horace J. Brown, or Axton F. Jones, or either or any of them, at any time filed or caused to be filed with the Corporation Commissioner of the State of California any application or applications for a permit or permits for the issuance to the Brownmoor Oil Company, or the stockholders of the Brownmoor Oil Company, of any of the stock of the Italo Petroleum Corporation of America, agreed by the Italo Petroleum Corporation of America to be paid by it as a part of the purchase price of the assets of the Brownmoor Oil Company. There is no evidence that they, or either or any of them, had knowledge of, or participated in, any of the transactions had between the

Italo Petroleum Corporation of America, and the Brownmoor Oil Company, or between either of said corporations and the Corporation Commissioner of the State of California respecting the purchase by the Italo Petroleum Corporation of America of the assets of the Brownmoor Oil Company.

No. XXII-A. That there is no evidence in this case, and you are not to consider any evidence in this case, as proving or tending to prove, that the defendants Fred Shingle, Horace J. Brown, or Axton F. Jones, or either or any of them, were directors of the Italo Petroleum Corporation of America, or that they caused the Italo Petroleum Corporation of America to enter into an agreement with the Brownmoor Oil Company providing for the purchase of the assets of the Brownmoor Oil Company by the Italo Petroleum Corporation of America or that they caused the Italo Petroleum Corporation of America to issue 600,000 shares of its preferred or 600,000 shares of its common capital stock as a part of the purchase price to be paid for the said assets of the Brownmoor Oil Company or that they filed or caused to be filed with the Commissioner of Corporations of the State of California, an application for a permit to issue said 600,000 shares of the preferred or 600,000 shares of the common capital stock of the said Italo Petroleum Corporation of America, as a part of the purchase price to be paid for the said assets of the Brownmoor Oil Company.

United States v. Gouled, 253 F. 439
Bill of Particulars, p. 3, par. 4-c and 4-d
Bill of Particulars, p. 4, par. 4-h".

No. VIII. You are instructed that there is no evidence in this case that the defendants, Fred Shingle, Horace J. Brown, or Axton F. Jones, or either or any of them, wrongfully or otherwise received a part of the stock of the Italo Petroleum Corporation of America issued by it as a part of the purchase price of the assets of the Brownmoor Oil Company; there is no evidence that they or either or any of them unlawfully or wrongfully received any of the proceeds derived from the sale of the shares of stock issued by the Italo Petroleum Corporation of America as a part of the purchase price of the assets of the Brownmoor Oil Company. Fraud is never presumed and the burden is upon the person claiming fraud to prove it to your satisfaction by competent evidence beyond all reasonable doubt. In the absence of such evidence you are to presume that the said defendants were innocent of any wrongful or fraudulent conduct."

No. XII-B. There is no evidence in this case, and you are not to consider any evidence in this case, as proving or tending to prove that the defendants Fred Shingle, Horace J. Brown, or Axton F. Jones, or either or any of them, caused the Italo Petroleum Corporation of America to enter into an agreement with the McKeon Drilling Co. Inc., by the terms of which the Italo Petroleum Corporation of America agreed to purchase or did purchase certain assets of the McKeon Drilling Co. Inc., or that they or either of them caused said agreement to provide that an excessive consideration should be paid for said assets; or that they caused the issuance of, or the delivery to, the McKeon Drilling Co. Inc. of 4,500,000 shares of the capital stock of the Italo Petroleum Corporation of

America as a part of the consideration to be paid for said assets of the McKeon Drilling Co. Inc.

U. S. v. Gouled, 253 F. 439

Bill of Particulars, p. 5, par. 2.

No. XXII-C. You are instructed that there is no evidence in this case, and you are not to consider any evidence in this case, as proving or tending to prove that the defendants Fred Shingle, Horace J. Brown, or Axton F. Jones, or either or any of them, should, or that they did apply to the Commissioner of Corporations of the State of California for a permit to issue stock of the Italo Petroleum Corporation of America for the purpose of acquiring or purchasing the properties of various companies, including the properties of the McKeon Drilling Co. Inc.; there is no evidence that they, or either or any of them, should, or that they did, represent to the Commissioner of Corporations of the State of California in making said application, that the Italo Petroleum Corporation of America, had made an agreement with the McKeon Drilling Co. Inc. to issue or deliver to the McKeon Drilling Co. Inc. 4,500,000 shares of the capital stock of the Italo Petroleum Corporation of America as a part of the purchase price to be paid by it for the said properties of the McKeon Drilling Co. Inc.; there is no evidence that defendants, Fred Shingle, Horace J. Brown, or Axton F. Jones, or either, or any of them at the time said application was filed with the Corporation Commissioner of the State of California, knew or intended that the McKeon Drilling Co. Inc. should or that it did receive only 2,000,000 shares of the said stock of the Italo Petroleum Corporation of America issued as a part

of the purchase price for the assets of the McKeon Drilling Co. Inc.

U. S. v. Gouled, 253 F. 439

Bill of Particulars, p. 6, par. O-4 incorporating par. L-5.

XXII-D. You are further instructed, in accordance with the foregoing rules respecting the effect of bills of particulars that there is no evidence in this case, and you are not to consider any evidence in this case, as proving or tending to prove that the defendants, Fred Shingle, Horace J. Brown, or Axton F. Jones, or either, or any of them, had any secret arrangement or agreement either among themselves or with any of the other defendants whereby they, or any of the defendants, were to receive back, or did receive back, from the McKeon Drilling Co. Inc. 2,500,000 shares of the capital stock of the Italo Petroleum Corporation of America, issued by that company as a part of the purchase price for certain assets of the McKeon Drilling Co. Inc. either without the knowledge or consent of the stockholders of the Italo Petroleum Corporation of America, or without giving any consideration therefor.

Bill of Particulars, p. 5, par. 4

Bill of Particulars, p. 6, par. O-1.

No. XXII-F. You are further instructed that there is no evidence in this case, and you are not to consider any evidence in this case, as proving or tending to prove, that the defendants Fred Shingle, Horace J. Brown, or Axton F. Jones, or either or any of them, were parties to or had knowledge of any secret arrangement or agreement, if

any there was, whereby any defendant in this case was to receive back from the McKeon Drilling Co. Inc. all or any part of the 2,500,000 shares of the capital stock of the Italo Petroleum Corporation of America issued as a part of the purchase price for certain assets of the McKeon Drilling Co. Inc.

No. XII-G. In accordance with the rules stated to you with respect to the effect of bills of particulars, you are further instructed that there is no evidence in this case, and you are not to consider any evidence in this case, as proving or tending to prove, that the defendants, Fred Shingle, Horace J. Brown, or Axton Jones, or either or any of them, should, or that they did sell, or cause to be sold to some of the persons designated in the indictment, as the persons to be defrauded, any stock of the Italo Petroleum Corporation of America, received by them from the McKeon Drilling Co. Inc.; or that any such stock was sold by them, if any was sold, was sold pursuant to any secret arrangement or agreement to which they were parties or of which they had knowledge.

U. S. v. Gouled, 253 F. 439
Bill of Particulars, p. 6 par. O-3.

No. XIV. You are instructed that there is no evidence in this case, that the defendants, Fred Shingle, Horace J. Brown, or Axton F. Jones, or either or any of them, sold or caused the selling of any stock issued by the Italo Petroleum Corporation of America as the result of any secret arrangement or agreement, of which they had knowledge, or to which they were parties. The mere fact that the said defendants may have received some of the

shares of stock issued by the Italo Petroleum Corporation of America as part of the purchase price paid by it for the assets of the McKeon Drilling Co. Inc. creates no presumption that it was issued to the said Fred Shingle, or Horace J. Brown, or Axton F. Jones, or that it was received by them, pursuant to any secret arrangement or agreement. You are instructed that there is no presumption that written instruments are without consideration. On the contrary, the law presumes that all parties are honest, that the usual course of business has been followed, and that a written instrument was executed for a valuable consideration, and that it is free from fraud.

Thompson v. Thompson, 140 Cal. 545 at 548

Toomey v. Dundhy, 86 Cal. 639

Wenban Estate, Inc. v. Hewlett, 193 Cal. 675

Metropolitan Life Assn. v. Escat, 75 Cal. 513 at 518

Calif. Civil Code, Sec. 1614 at 1615.

No. XVI. You are instructed that, although it is alleged in the indictment, that some of the defendants made representations in order to induce persons to part with their money and property, which representations it is alleged in the indictment were false and untrue, there is no evidence in this case that the defendants, Fred Shingle, Horace J. Brown, or Axton F. Jones, or either or any of them, represented to any of the persons described as the "persons to be defrauded" that the McKeon Drilling Co. Inc. was receiving 4,500,000 shares of the capital stock of the Italo Petroleum Corporation of America as a part of the consideration for the properties of the said McKeon Drilling Co. Inc.

There is no evidence in this case that the defendants, Fred Shingle, Horace J. Brown or Axton F. Jones, or any or either of them, ever stated or represented that the Italo Petroleum Corporation of America was properly or efficiently managed, or that it had made profitable acquisitions.

There is no evidence in this case that the defendants, Fred Shingle, Horace J. Brown, or Axton F. Jones, or either or any of them, stated or represented that following the formation of the Italo Petroleum Corporation of America, it at once undertook a sound development program.

You are instructed that there is no evidence in this case, that the defendants, Fred Shingle, Horace J. Brown, or Axton F. Jones, or either or any of them, stated or represented that what had become one of Italo Petroleum Corporation of America's most important and valuable assets was the recent acquisition by the said Italo Petroleum Corporation of America of the world's famous *Temple* Petroleum Refining Patent.

No. XXIV. You are instructed that there is no evidence in this case that the defendants, Fred Shingle, Horace J. Brown, or Axton F. Jones, had any knowledge of the entries contained in the books of account of the McKeon Drilling Co. Inc., or the books of account of the Brownmoor Oil Company, or the books of account of the Italo American Petroleum Corporation, or the books of account of the Italo Petroleum Corporation of America.

See People v. Doble, 203 Cal. 510 at 516 and 517.

No. XXIII. You are instructed that with respect to the declarations of one defendant made by him outside of the presence of any other defendant, that before such declarations are competent as to any such absent defendant, it must be proved beyond all reasonable doubt by independent evidence that the scheme or artifice to defraud alleged in the indictment had been devised and that such absent defendant was a party thereto, and it must further be established that such declaration was made by such defendant in furtherance of the said scheme or artifice. It is only where knowledge and active participation, or an express or implied ratification can be proved, that one defendant is bound by the statements or declarations of another. The fact that the declarations were made before a defendant may have become associated with an alleged scheme or conspiracy, if any there was, does not of itself render the declarations inadmissible against him. However, his subsequent connection with the alleged scheme or conspiracy must be shown to your satisfaction beyond all reasonable doubt by independent evidence, and knowledge of the existence of such declaration must be brought home to him, or circumstances must be shown from which such knowledge of such declarations and a ratification thereof by him may be implied or inferred. If the evidence does not show that any such defendant had knowledge of such declarations, or that having such knowledge he impliedly or expressly ratified it, you are not to consider such declarations as to such defendant. You are to keep this instruction in mind

in considering the evidence of declarations made by some of the defendants in the absence of the defendants Fred Shingle, Horace J. Brown and Axton F. Jones

Underhill Crim. Ev. Sec. 718
Marrash v. U. S. 168 F. 225
Wallace v. U. S. 245 F. 300
U. S. v. Babcock, 3 Dillon 581
Roberts v. U. S. C. C. A. 9 (248 F. 873)
Miller v. U. S. 133 F. 337 at 353
People v. Schmidt, 33 Cal. App. p. 426
Pope v. United States, 289, F. 312.

No. 41. You are instructed that some of the defendants have introduced evidence before you tending to show their good character and reputation for truth, honesty and intergrity. If, in the present case, the good character and reputation of any defendant, for these qualities is proven to your satisfaction, then such fact is to be kept in view by you in your deliberations, and it is to be considered by you in connection with the other facts in the case, and if, after a consideration of all the evidence in the case, including that bearing upon the good character and reputation of the said defendants, the jury entertain a reasonable doubt as to such defendants' guilt, then it is your duty to acquit any such defendant. Proof of good character and reputation in connection with all the other evidence, may generate a reasonable doubt, which entitles the defendant proving such good character and reputa-

tion to an acquittal, even though without such proof of good character the jury would convict.

People v. Mitchell, 129 Cal. 584
Taylor v. State, 149 Ala. 32.
White v. U. S. 164 U. S. 100; (41 L. ed. 365)
McKnight v. U. S. (*07* Fed. 208) C. C. A. 6
Searway v. U. S. (184 Fed. 716.)

No. 30. You are instructed that by the finding of an indictment no presumption whatsoever arises to indicate that a defendant is guilty, or that he had had any connection with, or responsibility for, the act or acts charged against him. A defendant is presumed to be innocent at all stages of the proceedings until the evidence introduced on behalf of the prosecution shows him to be guilty beyond a reasonable doubt. This rule applies to every material element of the offense charged. The burden of proof is upon the government in this case to show the guilt of each defendant, and all the presumptions of law, independent of evidence, are in favor of the innocence of each defendant. And in this case, the court instructs you that if, after you have considered all the evidence in the case, you then have a reasonable doubt as to the guilt of the defendant or any defendant, then such defendant as to whom you have such a reasonable doubt is entitled to the benefit of that doubt, and you should acquit him. Mere suspicion will not authorize a conviction as to any defendant. A reasonable doubt is such a doubt as you may have in your minds when, after fairly and impartially considering all of the evidence, you do not feel satisfied to a moral certainty of the defendant's guilt.

Reasonable doubt is not mere possible doubt, because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty of the truth of the charge. The burden of proof is upon the prosecution. All the presumptions of law, independent of evidence, are in favor of innocence; and every person is presumed to be innocent until he is proved guilty. If upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal. For it is not sufficient to establish a probability though a strong one arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary, but the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgment of those who are bound to act conscientiously upon it. And, whenever, after a careful consideration of all of the evidence, your minds are in that state where a conclusion of innocence is indicated equally with a conclusion of guilt, or there is a reasonable doubt as to whether the evidence is so balanced, the conclusion of innocence must be adopted.

Judge James' Instructions in U. S. v. Sugarman, et al.

Commonwealth v. Webster, 5 Cush. 711.

52 Am. Dec. 730 at 731 for Definition of Reasonable Doubt.

No. 55. You are instructed that all of the evidence which has been received in this case is not applicable to all of the defendants. Only such evidence as tends to directly connect a particular defendant with the offenses charged in the indictment can be considered by you in determining the guilt of that defendant. With respect to the books of account and other records of the various corporations concerning which testimony has been admitted, you are instructed that the mere fact that a defendant is an officer, director, or employee of such company, does not make such books in anywise admissible as to him. Before any entry in such books can be considered by you in determining the guilt of any defendant, it must first be proven to you beyond a reasonable doubt that such defendant made, or caused to be made, that particular entry, or that it was made with his knowledge and under his supervision. Unless you so find, no entry in the books of account can be considered by you in any manner as proving or tending to prove the guilt of any defendant.

Osborne v. U. S. (17 F (2) 246) C. C. A. 9.

No. 42. You are the sole judges of the credibility and the weight which is to be given to testimony of the different witnesses who have testified upon this trial. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies; by the character of his testimony, or by the evidence affecting his character for truth, honesty, and integrity, or his motives; or by contradictory evidence, or by showing that he has been convicted of a felony. In judging the credibility of the witnesses in this case, you may believe the whole or any part of the evidence of any witness,

or may disbelieve the whole or any part of it, as may be dictated by your judgment as reasonable men. You should carefully scrutinize the testimony given, and in so doing consider all of the circumstances under which any witness has testified, his demeanor, his manner while on the stand, his intelligence, the relation which he bears to the prosecution or the defendants, the manner in which he might be affected by the verdict and the extent to which he is contradicted or corroborated by other evidence, if at all, and every manner that tends reasonably to shed light upon his credibility. If a witness is shown knowingly to have testified falsely on the trial touching any material matter, the jury should distrust his testimony in other particulars, and in that case you are at liberty to reject the whole of the witness' testimony, except in so far as it is corroborated by other credible evidence.

Instructions of Judge James in U. S. v. Sugarman, et al.

We except to the refusal of the court to give the following unnumbered instructions requested by all of the defendants for the reason that the matters therein suggested are a proper statement of the law and have not been by the court fully covered or presented to the jury in its given instructions and such instructions relate directly to the questions to be determined by the jury and are necessary to properly aid them in their determination of the questions submitted for their consideration:

You are instructed that the evidence shows without contradiction that the properties which were sold by the McKeon Drilling Company to Italo Corporation of America were producing oil properties; that said properties

were appraised and evaluated by disinterested competent petroleum engineers, who are experts in the valuation of oil properties; that said petroleum engineers valued the said properties at various prices, the minimum valuation being approximately $5,800,000.00; that the price contracted to be paid by the Italo Corporation of America to the McKeon Drilling Company for said properties was in part the assumption of an indebtedness not to exceed $500,000.00, in part the payment of $500,000.00 in money, in part the payment of $500,000.00 in notes, and in part the delivery of one million shares of the preferred capital stock and 3,500,000 shares of the common capital stock of said corporation. These facts having been proven, you are instructed that the transaction was just and reasonable and was not fraudulent, notwithstanding the fact that the defendant Robert McKeon at the time was interested in the McKeon Drilling Company and was an officer and director thereof and was also a director of the Italo Corporation of America, it being also shown by the undisputed evidence that Robert McKeon's connection with the McKeon Drilling Company was disclosed to the Italo Corporation of America and that fact was spread upon the minutes of a meeting of the Board of Directors of said corporation held prior to the consummation of the transaction and at a time when said transaction was under consideration by the Board of Directors.

C. C. 311.

You are instructed that it is lawful for directors of a corporation to be interested in properties sold to the corporation and to be interested in the consideration which the corporation pays for such properties, and it

is lawful for such officers and directors not to disclose to the corporation, or its other officers or directors, their interest in the transaction or in the consideration paid by the corporation, if the transaction as to the corporation is just and reasonable at the time it was authorized, made or approved. In other words, secrecy as to the interest of directors and officers in a transaction is lawful, provided the transaction as to the corporation is just and reasonable; that is to say, provided the properties acquired by the corporation are of a value commensurate with the consideration which the corporation pays therefor. Therefore, if you believe from the evidence that the value of the properties transferred to the corporation by the McKeon Drilling Company was commensurate with the value of the money and stock which the Italo Corporation of America paid therefor, the fact, if you find it to be a fact, that one or more of the officers or directors of Italo Corporation of America was interested in the transaction, in that such officer or director received a part of the consideration paid by the Italo Corporation of America for said properties, would not make the transaction fraudulent but on the contrary said transaction would be lawful.

You are instructed that under the laws of the State of California, it is lawful for a corporation to issue all or any part of its capital stock in payment for properties transferred to it by its promoters, directors, or any other person or persons, and that under the laws of said State, it is lawful for the interested parties to put a valuation upon speculative property, such as oil leases or oil wells, based upon the opinions of petroleum engineers or other experts, for the purpose of fixing the number of shares

of stock to be paid for said properties, and that the par value of the stock to be issued, as full or part payment for such properties, is not to be deemed or considered as its actual or intrinsic value, nor is the stock exchange or curb exchange price of stock to be considered or deemed as its actual value. The value of stock issued in payment for properties is determined by the value of the assets owned by the corporation, after deducting therefrom all of the liabilities of the corporation, other than its stock liability.

You are instructed that a director of a corporation may advance money to it, may become its creditor, may take from it a mortgage or other security, and may enforce the same like any other creditor, subject only to the obligation of acting in good faith. It is not a fraud upon the corporation or its stockholders for a director to fail to disclose to the corporation, or to the other directors, that he is the real lender, where the loan is nominally made by another person or by a syndicate of which the director was a member. In the absence of proof of bad faith it was not a fraud upon the Italo Petroleum Corporation of America for any director of the Italo Petroleum Corporation of America to be a member of the syndicate which loaned $80,000 to the Italo Petroleum Corporation of America; nor was it wrongful for him to fail to disclose this fact to the corporation or its stockholders.

There is no presumption that the face value or par value of the capital stock of a corporation is its real value. The fact that the price paid by the syndicate for the 6,000,000 shares of capital stock of the Italo Petroleum Corporation of America may have been less than

its par value or less than its actual value did not make the contract or transactions illegal or fraudulent.

Castle v. Acme Ice Cream Co., 101 Cal. App. 94 at 101.

O'Dea v. Hollywood Cemetery Ann. 154 Cal. 67.

Schnittger v. Old Home, etc. Mining Co. 144 Cal. 603, 606.

2 Thompson Corpn. 3rd Ed. Sec. 1352

Stensgard v. St. Paul Real Est. etc. Co. 50 Minn. 429; 17 L. R. A. 575.

You are instructed that there is no presumption that the stock of a corporation is worth its par or face value. A certificate of stock is only evidence that the holder has an interest in the corporation, and its franchises and property, in the proportion that the stock held by him bears to the whole amount of stock; but the certificate of stock is no evidence of the financial standing of the corporation, nor of the value of its franchises and property. Neither is there any presumption that the face value or the par value of the capital stock of a corporation is its real value. The fact that the price paid by the syndicate for the 6,000,000 shares of the capital stock of the Italo Petroleum Corporation of America may have been less than the par value of that stock, or less than its face value, or less than its actual value did not make the contract or the transactions relative thereto illegal or fraudulent.

Schnittger v. Old Home etc. Mining Co. 144 Cal. 603 at 606.

2 Thompson on Corporations 3rd Ed Sec. 1352.

Stensgard v. St. Paul Real Estate Title Ins. Co., 50 Minn. 429 (17 LRA 575)

MR. ABRAHAMS: As a matter of record, I think, your Honor, we would like to have an exception to go to each and every part of the charge.

THE COURT: Very well.

MR. WOOD: I join in the exception.

MR. SIMPSON: Your Honor, I think your Honor made a misstatement in respect to the summary that your Honor gave of what the indictment and bill of particulars were supposed to charge. Your Honor stated that when you used the term Italo Corporation or Italo Petroleum Corporation or Italo, that you were referring to the Italo Petroleum Corporation of America. And when your Honor was instructing the jury respecting the charge contained in the indictment as to the payment of dividends out of capital rather than out of earnings your Honor used the term Italo Corporation which, under the indictment, does not refer to the Italo Petroleum Corporation, but refers to the Italo-America.

THE COURT: Well, that probably can be corrected by stating to the jury, and the jury are instructed that the instruction relative to the declaration of dividends applies to both corporations.

MR. SIMPSON: No, it is not charged in the indictment with respect to any corporation except the Italo-American.

THE COURT: Very well, then. Confine it to the Italo-America.

MR. SIMPSON: That is what I had in mind, your Honor, I desire to take exception to the failure and refusal of the Court to give each instruction requested by any defendant and not given by your Honor. We sub-

mitted written instructions, and your Honor has a copy of them, and I think the Court will deem that sufficient, because the Court has them before him at this time and knows what I am referring to, and I take exception to the failure and refusal of the Court to give the requested instructions upon the grounds and for the reasons that they were correct statements of the law and should have been given and are not covered by instructions given. We specifically, also, except to the failure and refusal of the Court to give each and every specially requested instruction requested by the defendants Shingle, Brown and Jones, With respect to the instructions that your Honor did give, your Honor failed to include in his summary of the indictment and bill of particulars the restrictions placed thereon by the bill of particulars as to the meaning or interpretation of certain representations that are alleged to have been made. The bill of particulars specifically restricted those, and your Honor failed to mention them, and in one part of your Honor's instructions your Honor included as defendants who were supposed to have participated in certain transaction certain defendants who under the bill of particulars are excluded therefrom.

Now, we take exception to the instructions of the Court relative to the purpose of the mail fraud statute and its reference to the postal service and its purpose being to keep dishonest persons from using the mails, upon the grounds and for the reason that it is not a correct statement of the law, and it is not based upon any evidence and its tendency would be to leave an erroneous impression in the minds of the jury.

We except to the instruction given by the Court relative to a letter being mailed for the purpose of allaying discontent upon the part of any person, upon the ground that that was an incorrect statement of the law and is not borne out by any evidence in this trial.

We except to the instruction given by the Court that if the defendant thought that any letter mailed would have any tendency to effect the alleged scheme that that would be sufficient, and to the further instruction that it was not necessary that anyone be defrauded, because the indictment alleges that persons were defrauded, and the Government is bound to prove what they allege.

We except to the instruction given by the Court relative to the mailing of any mail matter by clerks or employees as being sufficient proof that any defendant had anything to do with that because your Honor was referring to a portion of the statute under which the indictment is not brought, and if that were the portion of the statute under which the indictment were brought, this Court would have no jurisdiction.

We except to the definition of reasonable doubt given by the Court to the jury upon the grounds and for the reasons that it was an incorrect statement of the law.

We except to the instruction given by the Court upon the question of the effect of good character testimony for the reason that the Court wholly omitted to state that testimony of good character or reputation was of such strength in and of itself to generate a reasonable doubt in the minds of the jury, and the requested instructions on that ground were a correct statement of the law, and your Honor omitted to give that.

THE COURT: I think perhaps that may be right. The jury may take the instruction that the reputation or testimony of good character is of itself sufficient to constitute or to justify a reasonable doubt. Anything further?

MR. SIMPSON: We except to the instruction given by the Court, I don't recall them specifically, because I could not write fast enough, but they generally were directed to the proposition in which the Court specifically cautioned the jury to interpret certain written documents, certain writing in evidence, at a time when certain acts were done and left the impression with the jury that they should construe them as they occurred at that time, because they might, they didn't think at that time that the matters might be investigated or looked into, upon the ground that it was not a correct statement of the law, and it was not the Court's duty to instruct the jury with respect thereto.

We except to the instruction given by the Court relative to the fact that if the books or records of any corporation were accessible to any officer or director of a company or any other individual that that would be binding upon him, because it is not a correct statement of the law, and on the contrary it must be shown that in a criminal action that although he had access that he actually did have personal knowledge of the entries in the books, and mere access would be insufficient.

We except to the instructions given by the Court relative to the fact that there was a fiduciary duty or obligation on the part of any officer or director of any corporation to disclose any facts of any kind or character to any

person who was a prospective purchaser of stock upon the grounds and for the reason that an officer of a corporation does not owe any fiduciary duty to anyone except the corporation or its then existing stockholders, and therefore the statement of the Court in regard to that is an incorrect statement of the law.

We except to the instruction given by the Court in which the Court in effect stated that it was a duty to disclose to prospective purchasers that profits may or may not have been made by him or someone else in a transaction whereby properties were turned over to the company and to the part of the instruction in which the Court said that there was evidence in this case sufficient to justify the jury in making a finding that some officer or director had sold some property to the Italo Company at a profit, upon the grounds and for the reason that the Court is invading the province of the jury who are the sole and exclusive judges of the facts, and upon the further grounds that it is not a correct statement of the law and that it is not based upon the evidence.

We except to the illustration given by the Court of some matter concerning which the Court stated he had personal knowledge about some president of some life insurance company engaging in a transaction whereby he or his estate was required to pay back to a corporation a secret profit upon the grounds and for the reason that the Court was not instructing the jury upon a matter of law or upon a matter of evidence, but was in effect going outside of the record and calling upon some personal experience that the Court had in his lifetime which is not before the jury, and it was improper for the Court to instruct the jury with respect to that matter.

We except to the instructions of the Court given relative to the matter of so-called secret profits, because the Court wholly neglected to define to the jury what constituted a secret profit, and therefore any instructions relative to that was entirely misleading.

We except to the instruction given by the Court relative to the law of conspiracy being the law, the same law as applies in mail fraud cases, to the fact that the jury was warranted in drawing a certain conclusion as to the existence of a conspiracy merely from the fact that different groups of persons at the same or at some other time were pursuing and object without going further and showing that there must have been a co-operation and common purpose and agreement between themselves.

We except to the instruction of the Court given defining the testimony of an accomplice and the weight to be given it and to the failure to fulfill the duty required by law of stating to the jury who any witness in this case would be who would be considered as an accomplice.

And I think generally I can state we except specifically on behalf of each and every defendant to the failure of the Court to give each and every requested instruction and state that the instructions given by the Court were not covered or do not cover the requests which were made.

THE COURT: Very well. Does any counsel have a bill of particulars? There is something in the bill of particulars that was not referred to by the Court with respect to the designation of certain acts, I think.

MR. SIMPSON: Yes, your Honor.

THE COURT: I would like to look at that, Mr. Simpson.

MR. SIMPSON: Here is what I had in mind; If your Honor will refer to those particular parts of the bill of particulars that refer to what the District Attorney meant by certain alleged misrepresentations.

THE COURT: Yes. Have you got a copy of the bill there?

MR. SIMPSON: I just got one that I wrote up here myself.

THE COURT: Well, just refer briefly to what they should be—

MR. SIMPSON: Well, we will take the so-called representation number two in the indictment. It alleges that the Italo Petroleum Corporation of America was properly and efficiently managed and had made profitable acquisitions when in truth and in fact, as the defendants well knew, the defendant Italo Petroleum Corporation of America was not properly and efficiently managed and had not make profitable acquisitions. Now, the Government in its bill of particulars, page 1, paragraph 2, as amended in the amended bill of particulars, states that the terminology that the company had not made profitable acquisitions was intended to mean that the acquisitions therein referred to made by the Italo Petroleum Corporation of America were not profitable, for the reason that a large part of the price paid by said Italo Petroleum Corporation of America for the property and assets of the Brownmoor Oil Company and the McKeon Drilling Company, Inc., and other properties purchased and acquired, and so on, and certain things.

THE COURT: All right. Now, gentlemen, with respect to this bill of particulars and the amended bill of

particulars you may take that into the jury room with you if you want to. I don't deem it necessary at this time to recite all of the matters referred to by counsel, but in the bill of particulars certain charges in the indictment are amplified, further defined, I think, and you are at liberty to take the bill of particulars together with the indictment itself to the jury room with you. Very well.

MR. WEST: May it please your Honor, there is one matter that I would like to direct your Honor's attention to. That is, that you failed in giving your instructions to instruct the jury that each defendant was entitled to the individual opinion of each member of the jury, and if *anyone* member of the jury had a reasonable doubt as to the guilt of any particular person, he should adhere to that opinion regardless of what the other members of the jury might think.

THE COURT: Well, it is specifically charged that each one has to be considered separately. I would think that that would be inclusive. However, the suggestion of counsel is included in the charge to the jury.

On behalf of the Government are there any exceptions?

MR. DIVET: If your Honor please, there was one matter.

THE COURT: Oh, excuse me. Go on.

MR. DIVET: In addition to all of the exceptions that have been taken we except to that part of the charge which states in substance and effect that if any letters were mailed by clerks or others within the scope of their usual employment, then it should be understood that said letters were placed in the mail by the defendants, urging as a ground of that exception that it places the presump-

tion of regularity in business above the presumption of innocence to which each defendant is entitled, and we therefore except upon that ground.

THE COURT: I don't recall the precise instruction that you refer to. The jury is instructed that in that matter the defendant could not be convicted, of course, by the acts of somebody else unless those acts were authorized by him expressly or by implication. If a clerk mailed a letter, it must appear that the defendant, before it can be considered as affecting him, authorized the mailing of it, that is to say: That it was understood by the defendant that it was part of the clerk's business to mail that letter, and that the defendant intended that that letter should be mailed. Very well. Anything further?

MR. DIVET: We take a further exception to that part of the charge which instructs the jury in effect that if any witness is shown to have testified falsely in any material matter his entire testimony may be disregarded by the jury upon the ground and for the reason that that is not a correct or unqualified statement of the law and omits all reference to the elements of wilfulness and lack of corroboration.

THE COURT: That should be corrected to be this, I think this is the exact language of the Code; That any witness who has wilfully testified falsely with reference to a material matter may be distrusted in all of his testimony, even to the extent of its rejection by the jury.

Mr. Carnahan, do you think something has been left out?

MR. CARNAHAN: No, it is not that. Your Honor, in one part of the instructions your Honor instructed the

jury that if any letters were mailed to support the enterprise of the defendants, that they were to be regarded as —could be regarded as making out an offense.

THE COURT: You say to support the enterprise?

MR. CARNAHAN: That is what your Honor said.

THE COURT: Well, that would mean the unlawful enterprise.

MR. CARNAHAN: We must except to that; and I assume that what your Honor intended the jury to infer from that was some unlawful enterprise, and that your Honor intended to repeat what you had said before that they must have been mailed for the purpose of executing the scheme which is charged in the indictment to be fraud.

THE COURT: Yes.

MR. CARNAHAN: And the language it seems to me might be misinterpreted to include letters that were mailed in the ordinary course of business for carrying on the enterprise that the defendants were generally engaged in.

THE COURT: Well, with the qualification that the enterprise referred to is the unlawful enterprise.

MR. CARNAHAN: Yes, your Honor.

THE COURT: Yes, that is so amended.

MR. MEADOR: If the Court please, as a matter of record, may the exceptions heretofore taken by the defense counsel apply equally to all defendants in the case?

THE COURT: Yes. My understanding is that that has been mentioned two or three times now.

Thereafter the jury having retired to deliberate upon said cause on July 20, 1933, at the hour of 2:45 p. m., the said jury in writing requested the court to send to the jury room certain exhibits that had been introduced in evidence at the trial of said cause, including among other things Exhibit 155, the statement of J. V. Westbrook to the Internal Revenue Agent, and Exhibits 297 and 299, the large charts admitted in evidence during the testimony of the Government witness, G. S. Goshorn. Thereupon counsel for the defendants objected to Exhibit 155 being taken to the jury room and considered by the jury during its deliberations, upon the grounds and for the reasons that the said Exhibit 155 contained matter that had been ordered stricken from evidence and was therefore not in evidence; upon the further ground that the said statement had been admitted in evidence only as against the defendant Westbrook, and the jury should be specifically instructed that they were not to consider the said statement or any statements made therein as against any defendant other than defendant Westbrook. That portion of Exhibit 155 which was not received in evidence but was ordered stricken from evidence is as follows:

Q. Do you know of any account carried by either Mr. or Mrs. Siens under an assumed name?

A. No sir.

Q. Do you know of any source of income of Mrs. Siens?

A. She has none that I know of.

Q. How long have you *know* Mr. and Mrs. Siens?

A. I have known Mr. Siens since 1921 and I have known Mrs. Siens about two and one-half years—maybe three.

Q. Do you know anything about this boat which was built for Mr. Siens?

A. Why, I understood that he and Mr. Wilkes were building a yacht which was costing $100,000 and some odd dollars.

Q. Do you know anything about the Sunset Exploration Company?

A. No, I do not. Have heard of it.

Q. Do you know what disposition has been made of this boat?

A. I understood it was sold some few weeks ago.

Q. Do you know to whom it was sold?

A. No, I do not.

Q. Have you ever loaned Mr. Siens any money?

A. I loaned him some small amounts of money from time to time when we first started the Brownmoor.

Q. What, in your estimation is his indebtedness to you at this time?

A. $11,600.00

Q. Did Mr. Siens ever have any talk with you relative his 1928 income tax return?

A. Yes sir.

Q. Did he ever talk with you about any income tax liability he may have had for prior years?

A. Yes sir.

Q. Did he tell you that he owed the Government any money for prior years' tax liability?

A. Yes sir.

Q. Did he mention the amount?

A. He did but I have forgotten the exact amount.

Q. What did he say relative to paying any outstanding tax liability?

A. I remember that he said he made the Government an offer of—I thought it was $10,000.00, and then they found out something and wouldn't settle for the $10,000.00.

Q. Did he *may* any request of you in connection with your tax return for 1928 to get you to have your return agree with one he proposed to file for himself?

A. He told me a way that we could charge off a lot of money and claim that we put the money in the Brownmoor through an attorney—a Mr. Shreve in San Diego, as he intended to show that he borrowed $45,000.00 and paid it back and that he could show that he made an investment and it was at a total loss in San Diego through Mr. Shreve.

Q. Then if I understand you right, Mr. Westbrook, Mr. Siens told you that he was going to claim that he had a $45,000.00 investment in Brownmoor stock and that he was going to arrange this transaction through Attorney Shreve of San Diego, is that correct?

A. Well, I don't know if it is Attorney Shreve or not. One is an attorney and the other isn't. I don't know whether it was Attorney Shreve or not but it was along those lines any way. It was either through Attorney Shreve or his brother.

Q. Do you know of any oil property from which Mrs. Siens receives a royalty?

A. No sir.

Q. Do you know of any oil property at Long Beach in which Mr. Siens may be interested?

A. He is interested in the Allied Petroleum and he may be interested in a well that we furnished the pipe for —$9200.00 worth—and which was told me a total loss to us (Shores, Siens and Westbrook.)

Q. What well was that Mr. Westbrook?

A. Well, the Union Oil Company took it over and Thomas Bailes was drilling it at that time.

Q. What was the name of the lease or the location?

A. I couldn't tell you that.

Q. Was it in the Signal Hill Field?

A. It was on Atlantic—near the frog pond and near the Hoyt lease.

Q. To whom did you furnish this $9200.00 worth of pipe?

A. To Mr. Bailes, I am positive. We put in the pipe which cost $9200.00 and were to receive the $9200.00 back out of—I think it was 25% of the oil—I am not positive of that—and then a permanent interest of 10% of the well, of which the Union finally finished this well.

Q. Have you ever received anything as a result of this transaction?

A. No.

Q. Do you have any definite knowledge at this time as to whether Mr. Shores or Mr. Siens did?

A. No, sir, I haven't.

Q. Do you have any knowledge as to whether this well was subsequently put on production?

A. I know it is a very good well to-day.

Q. Do you consider at this time that you still have an equity in this well?

A. Well, it looks as though I should have unless it was officially quit-claimed back and we took the loss, of which there never were any minutes or any meetings held on it in the Brownmoor.

Q. You have signed no quit-claim yourself have you, Mr. Westbrook?

A. No sir.

Q. Nor have you been advised that any has been signed in your behalf by either Mr. Shores or Mr. Siens?

A. No sir.

Q. Do you know, Mr. Westbrook, if the Shingle Syndicate, the purpose of which was to acquire certain oil properties in California for the Italo Petroleum Corporation, actually went through?

A. Yes sir, it went through and it is still in existence.

Q. You personally put no money in this?

A. No sir.

(Mr. Weaver)

Q. What is the basis for your last answer that this Syndicate made large profits?

A. Why do I believe they made large profits?

Q. Yes.

A. Well, the money was raised in the syndicate to pay off the indebtedness of the Italo and assume 12,000,000 shares of Italo stock and pay off in cash and stock for the various oil properties that the Italo had purchased, leaving a residue of a large number of shares which would belong to the syndicate and if sold ought to return from 5 to 10 to 1. That is not authentic.

(Mr. Cornelius)

Q. Mr. Westbrook certain papers were secured from you through an Internal Revenue Summons (Form 860).

These papers are herewith being returned to you. Are they complete and in the same order in which we received them?

A. Yes sir, they are all here.

The court overruled said objections of said defendants to said Exhibit 155 being taken to the jury room and ordered that the whole of said Exhibit 155 including the above stricken portion be delivered to the jury for consideration by it during its deliberation, to which said ruling of the court the defendants then and there excepted.

The defendants further objected to Exhibits 297 and 299 being taken to the jury room and considered by the jury during its deliberation upon the grounds and for the reasons that portions of said Exhibits 297 and 299 had been by the court ordered stricken from evidence, and said portions ordered stricken from evidence had not been eliminated from said Exhibits 297 and 299, specifically those portions of said Exhibits referring to certain stock as being Bonus stock, and the jury would therefore be considering evidence out of court, and upon the further ground that by considering said exhibits without the jury having the benefit of testimony which had been introduced to explain or contradict the matters appearing on said exhibits, the jury would be giving undue consideration to said exhibits which were introduced only for the purposes of illustration, all of which would be to the prejudice of the defendants. Said objections of defendants to said exhibits being taken to the jury room were overruled, exception noted, and the said court ordered the said exhibits 297 and 299, together with other requested exhibits, sent to the jury room to be considered by the jury

during its deliberation without eliminating from said exhibits the portions thereof that had been ordered stricken from evidence.

Thereafter and on July 21st, 1933, at the hour of 3:30 o'clock p. m. the jury returned to the courtroom for further instructions, at which said time the following instructions were given and the following proceedings had:

THE COURT: Gentlemen: I believe you have some request for some further instructions, confusion in the minds of some of the jurors as to the Court's instructions, particularly as to the relationship of count 15 to the remaining counts? Well, count 15 is the one that charges conspiracy, conspiracy to violate a law of the United States. The statute provides that whenever people conspire to violate the laws of the United States, they are punishable for that as a separate offense.

For instance, suppose somebody conspired to do murder, punishable by the United States, and did commit murder. They could be convicted of the murder, and also they could be convicted of the conspiracy to do the murder as a separate offense. Two offenses there. Ordinarily conviction for the murder would be enough. Nevertheless, that is the law. Now, two things are necessary to constitute conspiracy, two elements. First, the unlawful agreement, and then the commission of some overt act, something in furtherance of it. Now, very similar, you will observe, to the mail fraud indictment, that is, the formation of the scheme to defraud and the mailing of the letter. The conspiracy, however, would not necessarily involve the mailing of the letter, because the conspiracy to defraud by the use of the mails might be accomplished by doing

any overt act to further it, not necessarily the mailing of the letter. I suggested to you that it was necessary before you convict on the conspiracy count that the conspiracy itself involves and includes the use of the mails in carrying it out, that is to say, if the defendants in this case formed a scheme to defraud by the sale of stock, they must have also included in and as a part of their determination the use of the mails, because that is what the indictment says. Now, the overt act that they must do, as I explained, need not of necessity be the mailing of the letter, although it could be conceived with the mailing of the letter, would be an overt act if it were done with the intention of carrying out the conspiracy. Any other thing that was calculated to further the conspiracy need not be the result of any formal agreement. The conspirators, those engaged in unlawful acts do not sit down and say we hereby agree to do this, that, or the other, or it is understood and agreed, as an instrument is drawn up. Nothing of that sort. But if in any manner by mutual consent it is understood among them that some one common purpose be pursued, that will constitute a conspiracy with, of course, the commission of the overt act. Then it was explained that any one joining the conspiracy after it was formed with knowledge that it had been formed and what its purpose was made himself a part of the conspiracy. Just imagine a stream of water being joined by another branch. It becomes part of the original, with knowledge, you will understand, always, on the part of the person joining it that it is a conspiracy and what it was about, its objects and purposes.

Have I made myself plain in those matters? So far as its relation to the other counts goes, I call attention to the

fact that the conspiracy charged in the 15th count was in its general nature the same as the mail fraud count, in other words, it involves an unlawful agreement of some kind, the unlawful agreement being to violate a law of the United States, and if there is such together with the overt act, then it is punishable as a separate offense.

I think you said some other Court's instructions? Do you suggest any other matter that you want the instructions heretofore given you repeated or amplified or explained in any way? You may so express your wish if you desire, if such is the case. The foreman may speak. Anything further?

THE FOREMAN: Unless someone else has some suggestion.

THE COURT: Anyone may ask any information that you see fit. Anyone among the jury.

A JUROR: Your Honor, it is not for me to speak, but one or two took the position that if they rendered a verdict of guilty on the last count, that it vitiated all the other counts, and they were not affected. Is that true?

THE COURT: No, no, no, that is not at all true. No, as I explained to you, it is a count in and of itself—Well, I am not prepared to say, no acquaintance or very little at least with the criminal law of the state, it is a feature of the United States statutes that we have often met with, this matter of the prosecution of offenses as a conspiracy, and it is as I explained to you. Will counsel advise me whether a *a* similar statute exists in this state?

MR. ABRAHAMS: If the court please, there is a conspiracy statute, but it is not as limited a statute as this statute is.

THE COURT: No, that is my impression.

MR. ABRAHAMS: The statute in the state applies to any felony and the agreement to commit it, but as I understand, this statute, it is a limited statute and only applies to an agreement to use the mails for certain purposes and it is not a general statute.

THE COURT: Well, that is the mail statute.

MR. ABRAHAMS: No, I am speaking of the conspiracy statute in this state.

THE COURT: But the conspiracy statute is confined to the use of the mails.

MR. ABRAHAMS: No, the conspiracy statute in this case is a conspiracy to violate a law of the United States.

THE COURT: Yes.

MR. ABRAHAMS: My understanding of the law is that they have to conspire to devise a scheme and artifice to defraud and use the mails in furtherance of that scheme, but it is not necessary that an actual use of the mails take place.

THE COURT: Yes, that is very true. It is not necessary to find a person guilty under the conspiracy statute that the mails were actually used. The conspiracy itself is the offense, but it must involve an overt act, some positive act done to further the object.

MR. REDWINE: And may I make one further suggestion to the Court?

THE COURT: Yes, sir.

MR. REDWINE: I believe your Honor instructed the jury that the defendants or any of them could be found guilty on any of the counts of the indictment, and

each count of the indictment is a separate and distinct charge as against the defendants.

THE COURT: Yes, that is true. I don't know myself whether I called attention to that. However, attention was called to the fact that each defendant must be separately considered with respect to each charge, and, of course, all defendants may be acquitted or all convicted, or some acquitted and some convicted, as you may find proper.

MR. WOOD: If the Court please, I desire that the record show and the jury be instructed that the statement of the District Attorney concerning his voluntary statement about the conviction of any defendant upon any count of the indictment was uncalled for and unwarranted for the purpose of the Court bringing the jury into this room. Counsel for the defendants have not had an opportunity of knowing in advance what the jury desires, and the statement of the District Attorney concerning the condition of any defendant on any count I believe is unwarranted, if the Court please.

THE COURT. Very well. That will be noted as an exception. Any other comments?

MR. SIMPSON: I don't know that it will be helpful, your Honor, but I don't believe your Honor instructed the jury either yesterday or today with respect to an overt act, that it must be an independent act following the making of an unlawful agreement if one was made. It could not be an act to further the so-called conspiracy unless it was done after the arrangement or agreement was formed, if one was formed.

THE COURT: Well, they were clearly instructed that it must be an act in the way of carrying out the conspiracy which necessarily would involve, I would think, its coming afterwards. The instruction given was the standard instruction, the printed form.

MR. SIMPSON: I did not recall.

THE COURT: Very well, gentlemen. We commend your industry and carefulness. Don't be afraid to be deliberate in your deliberations and your actions. That is what you are expected to be.

MR. SIMPSON: May I make one other suggestion, your Honor? I think that the jury should be cautioned that the instructions which they are now receiving are not to be received as the only instructions of the Court, but are to be considered in connection with all the other instructions that your Honor gave yesterday including the doctrine of reasonable doubt, the presumption of innocence, and so on and so forth.

THE COURT: Yes, the jury will bear that in mind if they can remember all the other instructions. They should remember them at any rate, that this is only a part and is to be considered in respect to all of them. Very well, gentlemen, will you again retire for further consideration?

Thereupon in accordance with the provisions of Rule 47 of the Rules of Practice of the United States District Court for the Southern District of California exceptions were entered and allowed to each and all of the instructions given by the Court, said instructions being those given after the return of the jury to the courtroom for further instructions and hereinabove set forth.

The jury having retired to deliberate upon its verdict on July 20, 1933, returned into the open court room on July 23, 1933, with its verdict finding the defendants guilty and not guilty as follows:

Finding the defendants Alfred G. Wilkes, E. Byron Siens and William J. Cavanaugh guilty on counts two, six and fifteen, and not guilty on counts three, seven, eight, eleven, twelve, thirteen and fourteen, and finding the defendants John McKeon, Robert McKeon John M. Perata and Paul Masoni guilty on count fifteen and not guilty on all other counts; and finding the defendant Maurice C. Myers guilty on count eight of the indictment and not guilty on all other counts; and finding the defendants Fred Shingle and Horace J. Brown guilty on count twelve and not guilty on all other counts; and finding the defendants James V. Westbrook, Howard Shores, Raleigh B. McKeon and Axton F. Jones not guilty upon all counts.

Thereafter and on July 28, 1933, the defendants Alfred G. Wilkes, E. Byron Siens and William J. Cavanaugh filed their separate motions for a new trial in words and figures as follows:

(Title of court and cause)

"Comes now the defendants, Alfred G. Wilkes, E. Byron Siens and William J. Cavanaugh, each for himself, by his attorney, moves the court to grant him a new trial in the above entitled cause for the following reasons, to-wit:

1. Matters occurred in said trial prejudicial to the defendants, and to each of them, before the jury and prevented them from having a fair and impartial trial before the jury.

2. The jury was not properly instructed as to all the law in said case to their individual prejudice.

3. That the court in instructing the said jury, in violation of his duty and to the individual prejudice of these defendants, narrated an incident from the personal experience of the person of the court, in the private life of the court, as an attorney and counsellor at law, which said incident pertained to certain alleged secret profits, growing out of a transaction wholly unallied with the issue of this case; and said personal experience so narrated to the jury by the said court was not the law of the said case, but was a misdirecting of the jury and seriously prejudicial to these defendants and each of them.

4. That the jury considered evidence outside of the case and were allowed to consider said evidence while deliberating on said case.

5. The verdict is contrary to the law.

6. The verdict is not supported by any of the evidence in the case.

7. There was no evidence whatsoever to support a verdict on the 2nd, 6th and 15th counts of the indictment.

8. The acquittal of these defendants under the verdict of the jury as to counts other than the 15th count was an acquittal on the 15th count, for the reason that the 15th count was superfluous and tended to charge these defendants with the same offense.

9. The District Attorney was guilty of misconduct in stating in the presence of the jury, after the case had been submitted to them by the court and when they were brought back into the court for further instructions, that

the jury was entitled to convict the defendants upon any and every count in said indictment. The misconduct of the district attorney in making said voluntary statement alleged in the presence of the jury was prejudicial to these defendants and unlawfully influenced said jury, because said statement was made after a juror had inquired of the court if they, the jury, in convicting on the 15th count of the indictment, would vitiate all the other counts in said indictment.

Dated this 28th day of July, 1933.

BUELL R. WOOD
Attorney.

And the said defendants Alfred G. Wilkes, E. Byron Siens and William J. Cavanaugh thereupon moved the court that judgment in said cause be arrested against them upon each of the following grounds:

1. That the indictment is defective in matters of substance more fully set out in each and every ground heretofore set out in the demurrer and overruled by the court.

2. The bill of indictment in this cause is insufficient to support any judgment against said defendants.

3. The indictment is not sufficient in form or substance to enable these defendants to plead the judgment in bar of a prosecution for the same offense.

4. That section 215 of the Federal Penal Code under which said indictment was brought is unconstitutional in this: that the said section makes unlawful the devising or intending to devise a scheme to defraud, etc. and to use the United States Mails in furtherance thereof without

defining what the said fraud is or what kind of a fraud it is unlawful to devise, or intend to devise, and for that reason the said section delegates to the court and jury the duty of such a penal definition, the same being an unconstitutional and unlawful delegation by the Congress to the Judicial.

5. There is a fatal variance between the allegations of the indictment of said cause and the proof in the following particulars, towit:

(a) These defendants with others are accused in said indictment of selling certain oil properties to Italo Petroleum Corporation of American for in excess of their value, and according to the proof adduced the properties were worth the consideration paid creating thereby legal title in the subject matter of said consideration, rendering said consideration wholly outside and not included within the alleged fraud charged in said indictment.

(b) That nowhere in the proof of said case was there ever any stock or other considerations issued by said Italo Petroleum Corporation of America as alleged, but the proof established the fact that the corporation issued, pursuant to a permit granted it by the Corporation Commissioner of the State of California, 12,000,000 shares of its capital stock to a trustee, and that said trustee, acting in accordance with the expressed instructions of the said Corporation Commissioner of the State of California, issued said stock lawfully and not otherwise, and that the presumption of legality attaching to the acts and doings of the said trustee continued throughout the entire period of time covered by the allegations of the indictment and such legality attached itself to all issue of stock made by said trustee.

6. That Government Exhibit ..... is a permit issued by the Corporation Commissioner of the State of California to the Italo Petroleum Corporation of America and said permit contains all and every, in complete form, the material allegations of this indictment and after said protest and complaint were filed with the said Corporation Commissioner, the Corporation Commissioner of the State of California under his findings of fact and conclusions of law decided adversely against the complainants herein, the subject matter, of said complaint, and protests lodged against the issuance of said permit are in legal effect the essential elements of the scheme to defraud set out in the indictment and that the findings of the Corporation Commissioner of the State of California contained in the aforesaid exhibit is res adjudicata as to the subject matter in said permit, and the indictment in this case constitutes an unlawful collateral attack upon said findings of fact."

That on said July 28, 1933, the defendants John McKeon and Robert S. McKeon filed their following motion for a new trial:

(Title of court and cause)

"Come now John McKeon and Robert S. McKeon, defendants herein, by their attorneys, and each of them moves the Court to grant them a new trial in the above entitled cause for the following reasons, to-wit:

(1) The Court erred in overruling the demurrer of each of said defendants to the indictment and to Count 15 thereof, the said defendants having demurred to each Count separately and each of them having saved his

separate and several exceptions to the action of the Court in overruling his demurrer to said indictment and to each Count thereof and especially to Count 15 thereof.

(2) The Court erred in refusing to direct a verdict of not guilty as to each of these moving defendants at the close of the evidence in behalf of the prosecution.

(3) The Court erred in refusing to instruct the jury to return a verdict of not guilty as to each of these moving defendants on the 15th Count of said indictment at the close of the evidence in behalf of the prosecution, for the reason that there was no evidence sufficient to warrant a verdict of guilty.

(4) The Court erred in refusing to instruct the jury to return a verdict of not guilty as to each of these moving defendants at the close of all of the evidence.

(5) The Court erred in refusing to instruct the jury to return a verdict of not guilty as to each of these moving defendants at the close of all of the evidence, for the reason that there was not sufficient evidence to warrant a verdict of guilty.

(6) The verdict of the jury is contrary to law.

(7) The verdict is not supported by any evidence in the case.

(8) There was no evidence whatever to support the verdict on the 15th Count of said indictment.

(9) The Court erred to the prejudice of each of the defendants in refusing to give each and every instruction requested by the defendants, which was not given by the Court to the jury.

(10) The Court improperly instructed the jury to the prejudice of the defendants.

(11) The Court erred in admitting in evidence the books and records of Shingle-Brown & Company as against these moving defendants.

(12) The Court erred in admitting in evidence the books and records of Wilkes and Cavanaugh as against these moving defendants.

(13) The Court erred in admitting in evidence the books and records of McKeon Drilling Company.

WHEREFORE, each of the moving defendants prays that the Court set aside the verdict of the jury and grant these moving defendants, and each of them, a new trial.

Dated: July 28th, 1933.

A. G. Divit,

A. L. Abrahams

Neil S. McCarthy.

Attorneys for Defendants John McKeon and Robert S. McKeon."

And on said July 28, 1933, the defendants John McKeon and Robert S. McKeon each filed his separate motion in arrest of judgment, in words and figures as follows:

"Now come the defendants John McKeon and Robert S. McKeon and each for himself moves that the judgment in the above entitled cause be arrested on each of the following grounds:

I.

That Count 15 of the indictment fails to charge any offense against or violation of any of the criminal or penal laws of the United States of America, for the reason that the conspiracy charged in said Count is not a conspiracy to violate any substantive law of the United States of America and specifically is not a conspiracy to violate Section 215 of the Federal Penal Code.

II.

That Count 15 of the said indictment fails to charge any offense against or violation of any of the criminal or penal laws of the United States of America, for the reason that said Count charges a conspiracy, combination, confederation and agreement to conspire, combine, federate and agree, and said conspiracy so charged is not a violation of Section 37 of the Federal Penal Code, or of any other criminal or penal law of the United States of America.

III.

That Count 15 of the said indictment fails to charge any offense against or violation of any of the criminal or penal laws of the United States of America, for the reason that the scheme or artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations and promises from the class of persons alleged to have been defrauded or intended to

be defrauded, as set forth in said 15th Count of the indictment by reference to the first Count of said indictment, is not a scheme or artifice to defraud or to obtain money and property by means of false and fraudulent pretenses, representations and promises within Title 18, Section 338, U. S. C. A., formerly known as Section 215 of the Federal Penal Code.

IV.

That Count 15 of the said indictment fails to charge any offense against or violation of any of the criminal or penal laws of the United States of America, for the reason that the scheme or artifice to defraud or for obtaining money or property by means of false or fraudulent pretenses, representations or promises, charged in said Count to have been devised or intended to be devised and executed by the defendants therein named or described did not involve the obtaining of any money or property of the persons or class of persons referred to or described therein as the persons or class of persons intended by the defendants, or any of them, to be defrauded.

V.

That said Count 15 of the said indictment fails to charge any offense against or violation of any of the criminal or penal laws of the United States of America, for the reason that said Count fails to charge the making or intention to make or agreement to make by said defendants named or described in said Count of said indictment, or any of them, of any false or fraudulent pretenses, representations or promises, which was material to the scheme or artifice to defraud or for obtaining money or property by means

of the fraudulent pretenses, representations or promises which said Count charges to have been devised or intended to be devised by the defendants therein named or described, or any of them, pursuant to any alleged conspiracy.

VI.

That it plainly appears from the allegations of said Count 15 of the said indictment that the use of the post-office establishment of the United States was not contemplated or intended by the defendants named in said Count, or either or any of them, for the purpose of executing the scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations and promises alleged in said Count of said indictment.

John McKeon,
Robert S. McKeon
Defendants.

A. G. Divet
A. L. Abrahams
Neil S. McCarthy
Their Attorneys."

Then on said July 28, 1933, defendants Horace J. Brown and Fred Shingle, each for himself filed a motion for new trial, in words and figures as follows:

(Title of court and cause)

"Come now the defendants, Fred Shingle and Horace J. Brown, through their counsel and each for himself, and move the court for an order granting as to each of them a new trial as to the twelfth count of the indictment in the above entitled action, upon the following grounds:

1. That the court erred in its ruling upon the law during the trial of said cause.

2. That the court misdirected the jury in matters of law.

3. That the verdict is contrary to the law.

4. That the verdict is contrary to the evidence.

5. That the verdict of guilty upon the twelfth count of the indictment is inconsistent with and repugnant to the verdict of not guilty upon the fifteenth count of the indictment.

6. That there is a fatal variance between the allegations of the indictment, and the proof adduced at the trial.

7. That the defendants have heretofore been placed in jeopardy for the offense alleged to have been committed in the twelfth count of the indictment and have been acquitted of the commission of said offense by reason of the verdict of the jury acquitting them upon Count Fifteen of the indictment.

8. That the court erred in receiving any evidence *concerning* the Twelfth Count in said indictment.

9. That the court erred in failing to instruct the jury to find each of these defendants not guilty.

10. That the court erred in failing to properly define and explain to the jury the elements of the various offenses charged in the indictment, and particularly the elements of the offense charged in the Twelfth Count of the indictment.

11. The court erred in its instruction to the jury upon the instruction of reasonable doubt and presumption of innocence and of good character testimony.

12. That the jury received evidence out of court and evidence which had been ordered stricken from the record to the prejuudice of these defendants.

WHEREFORE, these defendants each for himself respectfully pray that the verdict of the jury upon the Twelfth Count of the indictment be set aside and a new trial granted, and for such other and further relief as may be just and proper in the premises.

H. L. Carnahan,

W. E. Simpson,

J. E. Simpson

Attorneys for Defendants Fred Shingle and Horace J. Brown."

Then on said July 28, 1933, the defendants Fred Shingle and Horace J. Brown each for himself filed his motion for arrest of judgment, in words and figures as follows:

(Title of court and cause)

"Come now Fred Shingle and Horace J. Brown, two of the defendants in the above entitled cause, against whom a verdict of guilty as to the Twelfth Count of the indictment was rendered on the 23rd day of July, 1933, and move the court to arrest judgment as against them and each of them and to hold the verdict of guilty as to the Twelfth Count of the said indictment to be null and void for the following reasons:

1. Because the Twelfth Count of the Indictment does not contain a statement of the acts constituting the offense in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended.

2. Because this court was without jurisdiction to hear or try this cause and was and is without jurisdiction or power to impose sentence herein.

3. Because these defendants in the indictment in this cause were charged with the other defendants with having conspired to devise a scheme and artifice to defraud and to use the United States Mails for the purpose of executing such scheme and on the trial of said cause which involved the identical evidence and the identical matters of fact and issues as are involved under the Twelfth Count of the indictment, the said jury returned a verdict finding your said defendants not guilty of the commission of the offenses charged in the Fifteenth Count of the said indictment and in each and every other count of the said indictment excepting the Twelfth Count thereof, and in said findings the parties were the same, the issues of fact

and issues of law necessarily tried and determined in said cause were the same and have been conclusively adjudicated in favor of these defendants, and this court is without power to again retry them upon the same issues of fact and/or law, and the said issues of fact and/or law involved in the said cause were the same issues of fact and/or law as are involved under the Twelfth Count of the indictment, and by reason of the finding of the jury upon the remaining counts of the indictment in which the said jury found these defendants not guilty, your said defendants have been acquitted upon the identical charges and evidence as they are now found guilty upon by reason of said finding of not guilty upon the Fifteenth Count of the indictment. All of the said issues of law and/or fact have been conclusively adjudicated in favor of your moving defendants, and the verdict of guilty upon the Twelfth Count of the indictment is inconsistent with the said findings of not guilty.

WHEREFORE, these defendants pray that this motion be sustained, and that the judgment of conviction against them upon the Twelfth Count of, the indictment be held for naught, and judgment be arrested and said cause dismissed, and for such other and further orders as may be just or proper in the premises.

H. L. CARNAHAN,
W. E. SIMPSON,
J. E. SIMPSON
Attorneys for Defendants Fred Shingle and Horace J. Brown."

Then on July 28, 1933, the defendant Maurice C. Myers filed his motion for a new trial in words and figures as follows:

(Title of court and cause)

Comes now the defendant, Maurice C. Myers, in the above entitled action, and moves the Court that the verdict in this action against him be set aside, and that he be granted a new trial in this case on the following grounds:

I.

That the Court misdirected the jury in matters of law.

II.

That the Court erred in the decision of questions of law arising during the course of the trial.

III.

That the verdict is contrary to the law.

IV.

That the verdict is contrary to the evidence.

V.

That the verdict is contrary to the law and the evidence.

VI.

That the evidence is insufficient to sustain or justify the verdict.

VII.

Because the verdict is against the weight of the evidence.

VIII.

Because the Court erred in overruling the defendant's demurrer to the indictment.

IX.

Because the Court erred in admitting irrelevant, immaterial, and incompetent evidence over the objection of defendant.

X.

Because of other errors of law occurring at the trial more fully shown by the transcript herewith, which transcript is hereto referred to and relied upon by defendant herein."

On said July 28, 1933, the defendant Maurice C. Myers filed his motion in arrest of judgment as follows:

(Title of court and cause)

"Comes now the defendant Maurice C. Myers in the above entitled cause, and moves the court to refrain from entering a judgment against him based upon the verdict entered in this cause upon the following grounds:

1. That there is a fatal variance between Count Eight of the indictment herein and the proof offered and received in support of said count.

2. That Count Eight of the indictment herein is not pleaded in the English language and is therefore insufficient to support any verdict rendered based on said Count Eight."

Thereafter and on said July 28, 1933, the Court made and entered its order overruling and denying each and all of the foregoing motions for a new trial and motions in arrest of judgment filed by all of said defendants to which said rulings of the court the defendants then and there separately excepted.

Thereupon, on July 28, 1933, the Court imposed judgment and sentence upon the defendants as follows:

That upon the second and sixth counts of the indictment the defendant Alfred G. Wilkes be imprisoned in a federal penitentiary for a period of five years on each count, the sentence on the sixth count to begin upon the termination of the sentence upon the second count, and that upon the fifteenth count of the indictment that the said defendant Alfred G. Wilkes be imprisoned in the said federal penitentiary for a period of two years, the said sentence on said fifteenth count to run concurrently with the sentence on count two; that in addition thereto the defendant Alfred G. Wilkes pay a fine of One thousand dollars on count two of the indictment, one thousand dollars on count six of the indictment and five thousand dollars on count fifteen of the indictment;

That the defendant E. Byron Siens be imprisoned for a period of five years each on counts two and six of the indictment, and for a period of two years on count fifteen of the indictment, the said sentences of imprisonment to run concurrently; that the said E. Byron Siens pay fines amounting to the sum of one thousand dollars each on

counts two and six of the indictment, and five thousand dollars on count fifteen of the indictment, thereby aggregating seven thousand dollars;

That the defendant William J. Cavanaugh be imprisoned in a county jail for a period of one year on counts two, six and fifteen, said sentences to run concurrently, and pay a fine of one thousand dollars on each of said counts;

That defendant Maurice C. Myers be imprisoned for a period of one year on count eight of the indictment and pay a fine of one thousand dollars;

That the defendant John McKeon be imprisoned in a federal penitentiary for a period of two years and pay a fine of five thousand dollars on count fifteen of the indictment;

That the defendant Robert McKeon be imprisoned in a county jail for a period of one year and pay a fine of five thousand dollars upon count fifteen of the indictment;

That the defendants John M. Perata and Paul Masoni be fined the sum of one thousand dollars each on count fifteen of the indictment;

That the defendants Fred Shingle and Horace J. Brown each be imprisoned for a period of one year on count twelve of the indictment and each pay a fine of one thousand dollars on said count twelve of the indictment.

To the rendering of such judgments and sentences the defendants each for himself by and through his counsel then and there duly excepted.

Thereupon and upon July 28, 1933, which is within the time provided by the rules of court for the presenting, signing and filing of the bill of exceptions herein, the said defendants and each of them asked and was granted leave by the court to present, within on or before November 28, 1933, the proposed bill of exceptions to the court and to the Honorable George Cosgrave, the Judge of said court, before whom and a jury this cause was tried, to be settled, allowed and filed and made a part of the record herein, according to the law and practice of the court, and the said court on said date granted the said defendants, and each of them, up to and including the 26th of October, 1933, within which to file amended and/or supplemental assignments of error to become a part of the transcript of record in the said cause, and thereafter, within the time allowed by law, the United States Circuit Court of Appeals for the Ninth Circuit, made and entered its order allowing the said defendants, and each of them up to and including October 26, 1933, within which to file their amended and/or supplemental assignments of error herein to become a part of the transcript of record on appeal in said cause, and the United States District Court for the Southern District of California made and entered its order extending the February 1933 term of said court to and including sixty days after the settlement and allowance

of the said bill of exceptions within which to docket said cause and to do and perform any and all things necessary to permit the defendants to perfect their appeal herein.

Thereafter the plaintiff herein asked and was granted by the court additional time within which to present proposed amendments to the proposed bill of exceptions to the said court to be settled, allowed and filed and made a part of the record herein according to the law and practice of the court.

Thereafter and on the 22nd day of December, 1933, on motion of the defendants an order was duly entered of record that the original exhibits offered in evidence in said cause be considered as incorporated in and as a part of the bill of exceptions in this cause as though actually a physical part thereof, due to the fact that it was impracticable to include the same in the said bill of exceptions herein, and accordingly the exhibits mentioned and in evidence herein and on file which are not set forth in this bill of exceptions, the same being separately certified by the court, are hereby incorporated and included herein and made a part hereof the same as if actually herein set out in full. Now as much as the matters above set forth do not otherwise appear as of record these defendants tender this, together with the said original exhibits, as their bill of exceptions which is all of the evidence received in said cause, and pray that they may be allowed, settled, signed and sealed by the judge of this court presiding at the trial, towit, by the Honorable George Cos-

grave, pursuant to the statute in such case made and provided to be filed and made a part of the record herein, which is accordingly done this 31st day of January, 1934, which was within the time heretofore granted by the court for the presenting, signing and filing of such bill of exceptions herein.

G. Cosgrave
United States District Judge.

The foregoing bill of exceptions contains all of the evidence in condensed and narrative form given or offered on the trial of the case of United States of America, plaintiff, vs Alfred G. Wilkes, et al. defendants, and correctly shows the proceedings had prior to and during said trial, and said bill of exceptions is correct in all respects and is hereby approved, allowed and settled, and made a part of the record herein.

Dated at Los Angeles, California, this 31st day of January, 1934.

G. Cosgrave
United States District Judge.

[Endorsed]: Lodged Nov 27, 1933 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk Engrossed Bill of Exceptions Filed Feb 1-1934 R. S. Zimmerman, Clerk By Thomas Madden Deputy Clerk.

[Title of Court and Cause.]

ORDER

Good cause appearing therefor, and upon motion of counsel for the defendants and appellants, it is hereby

ORDERED, that the said defendants and appellants herein have up to and including the 28th day of November, 1933, within which to serve, lodge, file and present for allowance and have allowed the proposed Bill of Exceptions herein, or a draft thereof, and the time of the said defendants and appellants within which to file the record in said appeal and docket the said cause with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit is hereby enlarged and extended up to and including sixty days after the allowance and settlement of the Bill of Exceptions herein, and the February 1933 Term of this court is hereby extended to said time for said purpose and all other purposes which may be necessary in order for the said defendants and appellants to perfect their appeal herein, said time being sixty days after the allowance and settlement of the Bill of Exceptions herein.

Dated: This 28th day of July, 1933.

Geo. Cosgrave
United States District Judge.

[Endorsed]: Filed Jul 28 1933 R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk

[Title of Court and Cause.]

STIPULATION AND ORDER

IT IS HEREBY STIPULATED, by and between the parties hereto through their respective counsel that the United States of America, the plaintiff herein, may have up to and including the 1st day of January, 1934, within which to serve and file proposed amendments to the bill of exceptions proposed by the defendants herein.

DATED: This 24 day of November, 1933

PEIRSON M. HALL,
United States Attorney,
GWYN S. REDWINE,
Special Assistant United States Attorney General

By Gwyn S. Redwine
Attorney for Plaintiff.

Buell R. Wood
(Buell R. Wood)
Attorney for Alfred G. Wilkes, E. Byron Siens and William J. Cavanaugh.

A. G. Divet
(A. G. Divet)

Neil S. McCarthy
(Neil S. McCarthy)

A. L. Abrahams
(A. L. Abrahams)
Attorneys for John McKeon and Robert S. McKeon.

Maurice C. Myers
(Maurice C. Myers)
In Propria Persona

H. L. Carnahan
(H. L. Carnahan)
W. E. Simpson
(W. E. Simpson)
J. E. Simpson
(J. E. Simpson)
Attorneys for Fred Shingle and Horace J Brown.

Upon reading and filing of the foregoing stipulation it is hereby ordered that the United States of America have to and including the 1st day of January, 1934, within which to serve and file proposed amendments to the bill of exceptions herein, and that the February, 1933 term of this court is hereby extended to said date for said purpose, and that the time within which to settle the said bill of exceptions be and it is hereby extended together with the February, 1933, term of this court to ten days after the filing of said proposed amendments.

DATED: November 27, 1933.

Geo. Cosgrave
United States District Judge.

[Endorsed]: Filed Nov 28 1933 R. S. Zimmerman, Clerk By Thomas Madden, Deputy Clerk

[TITLE OF COURT AND CAUSE.]

STIPULATION AND ORDER

IT IS HEREBY STIPULATED, by and between the parties hereto through their respective counsel that the United States of America, the plaintiff herein, may have up to and including the 1st day of February, 1934, within which to serve and file proposed amendments to the bill of exceptions proposed by the defendants herein.

Dated: this 28th day of December, 1933.

PEIRSON M. HALL,
United States Attorney

GWYN S. REDWINE,
Special Assistant United States Attorney General

By Gwyn S. Redwine
Attorney for Plaintiff.

Buell R. Wood
(Buell R. Wood)
Attorney for Alfred G. Wilkes, E. Byron Siens and William J. Cavanaugh.

A. G. Divet
(A. G. Divet)

Neil S. McCarthy
(Neil S. McCarthy)

A. L. Abrahams
(A. L. Abrahams)
Attorneys for John McKeon and Robert S. McKeon

Maurice C. Myers
(Maurice C. Myers)
In Propria Persona

H. L. Carnahan
(H. L. Carnahan)
W. E. Simpson
(W. E. Simpson)
J. E. Simpson
(J. E. Simpson)
Attorneys for Fred Shingle and Horace J. Brown.

Upon reading and filing of the foregoing stipulation it is hereby ordered that the United States of America have to and including the 1st day of February, 1934, within which to serve and file proposed amendments to the bill of exceptions herein, and that the February, 1933 term of this court is hereby extended to said date for said purpose, and that the time within which to settle the said bill of exceptions be and it is hereby extended together with the February, 1933 term of this court to ten days after the filing of said proposed amendments.

DATED: December 29th, 1933.

Geo. Cosgrave
United States District Judge.

[Endorsed]: Filed Dec 29 1933 R. S. Zimmerman, Clerk By Thomas Madden, Deputy Clerk

At a stated Term, to wit, the October Term, A. D. 1933 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday the twenty-first day of August in the year of our Lord One Thousand Nine Hundred and thirty-three.

Present:

Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding,

Honorable WILLIAM H. SAWTELLE, Circuit Judge.

ALFRED G. WILKES, et al.,	)	
	)	
Appellants,	)	
	)	No.
vs.	)	Undocketed
	)	
UNITED STATES OF AMERICA,	)	
	)	
Appellee.	)	

ORDER GRANTING LEAVE TO APPELLANTS TO FILE AMENDED AND/OR SUPPLEMENTAL ASSIGNMENTS OF ERROR.

ORDERED motion of appellants, orally presented by Mr. Ward Sullivan, counsel for appellants, for leave to file amended and/or supplemental assignments of error in above cause by October 26, 1933 granted; said amended and/or supplemental assignments of error to be filed with the clerk of the lower court.

I HEREBY CERTIFY that the foregoing is a full, true and correct copy of an original Order made and entered in the within-entitled cause.

ATTEST my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this twenty-sixth day of August, A. D. 1933.

[Seal] Paul P. O'Brien
Clerk, U. S. Circuit Court of Appeals
for the Ninth District

[Endorsed]: Filed Aug 28 1933 R. S. Zimmerman, Clerk By Thomas Madden, Deputy Clerk

---

[Title of Court and Cause.]

ORDER

Good cause appearing therefor, and upon motion of counsel for the defendants and appellants, it is hereby

ORDERED, that the said defendants and appellants appealing herein may have up to and including ninety days from the date hereof within which to serve, make and file amended and/or supplemental assignments of error to become part of the transcript of record in this cause, and the February 1933 term of this court is hereby extended to comprise the period of ninety days from the date hereof within which to prepare, make and file the said amended and/or supplemental assignments of error herein.

Dated: The 28th day of July, 1933.

Geo. Cosgrave
United States District Judge.

[Endorsed]: Filed Jul 28 1933 R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk

[Title of Court and Cause.]

PETITION OF DEFENDANT, MAURICE C. MYERS FOR AN APPEAL.

Your petitioner Maurice C. Myers, one of the defendants in the above entitled cause, brings this, his petition for an appeal, to the District Court of the United States, in and for the Southern District of California, and in that behalf, your petitioner says:

That on the 28th day of July, 1933, there was made, given and rendered in the above entitled Court a judgment against your petitioner whereby your petitioner Maurice C. Myers was adjudged and sentenced to be imprisoned for a period of 1 year in the Co. Jail, and to pay a fine in the sum of.....Dollars, ($1000.00), and your petitioner says he is advised by his counsel and avers that there was, and is, manifest error in the records and proceedings had in said cause, and in the making, giving and entry of said judgment and sentence, to the great injury and damage of your said petitioner, each and all of which errors will be more fully made to appear by an examination of the Bill of Exceptions and the Assignment of Errors to be hereafter filed, and to the end that the judgment, sentence, and proceedings may be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, your petitioner prays that an appeal may be issued directed therefrom to the said District Court of the United States for the Southern District of California,

Central Division, returnable according to law and the practice of the Court, and that there may be directed to be returned, pursuant thereto, a true copy of the record, Bill of Exceptions, Assignment of Errors, and all proceedings had and to be had in said cause, and that the same may be removed into the United States Circuit Court of Appeals for the Ninth Circuit, to the end that the error, if any has happened, may be duly corrected and full and speedy justice done your petitioner.

WHEREFORE, your petitioner prays the issuance of the appeal as herein prayed, and that the Assignment of Errors to be hereafter filed may be considered as the Assignment of Errors upon the Appeal, and that the judgment rendered in this cause may be reversed and held for naught, and that said cause may be remanded for further proceedings, and that your petitioner be awarded a supercedeas upon said judgment and all necessary processes, including bail.

Maurice C. Myers
Petitioner.

Mack Meader,
Attorney for Petitioner.

[Endorsed: Filed Jul 28 1933 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk

[Title of Court and Cause.]

PETITION FOR APPEAL

To the Honorable George Cosgrave, Judge of the above entitled court:

Horace J. Brown, the petitioner in the above entitled cause and a defendant therein, respectfully shows that on December 4, 1931, the Grand Jury for the United States District Court for the Southern District of California, Central Division, returned an indictment against your petitioner containing fifteen counts, the first fourteen of which charged your petitioner with devising a scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises and with using the United States mails for the purpose of executing said scheme, and the fifteenth count of which purported to charge your petitioner with the other defendants with having conspired to use the United States mails in furtherance of a scheme to defraud, and your petitioner having entered a plea of not guilty to said charges, and having been placed upon his trial upon said plea, a verdict of guilty was rendered against your petitioner, Horace J. Brown, upon the twelfth count of said indictment, the same being criminal case No. 10,679-M of the records of said court, and a verdict of not guilty upon the remaining counts of said indictment, and on the said verdict of said jury in said cause, judgment was thereupon pronounced on the said defendant and

petitioner, Horace J. Brown, that he be imprisoned in the County Jail for a period of one year and fined $1000, which said judgment was rendered on the verdict of the said jury in the said cause against the said defendant, Horace J. Brown, and the said defendant deeming himself aggrieved by the said verdict, judgment and sentence rendered herein, and deeming that the said record and proceedings in the said cause and the said judgment and sentence contained certain manifest errors which have intervened to the great prejudice of the said defendant, which errors are specified in the Assignments of Error filed herewith and to be supplemented and amended.

Now, therefore, the said defendant, Horace J. Brown, does hereby appeal from the verdict, judgment and sentence made and entered in the United States District Court for the Southern District of California, Central Division, to the United States Circuit Court of Appeals for the Ninth Circuit, and petitions the said District Court for an order allowing said defendant to appeal to said United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the Assignments of Error which is filed herewith, and in such amended or supplemental Assignments of Error as shall be made and filed herein after the making of the order allowing this appeal, and he prays that this appeal may be allowed and that a transcript of the record, proceedings, evidence and exhibits upon which the said order allowing the appeal is made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Your petitioner further prays that the said Court make and enter an order allowing said appeal, and enter a stay of execution of the judgment and sentence of imprisonment, and that your petitioner be released on bail, upon the execution of a bond in a sum to be fixed herein and conditioned according to law, to operate as a supersedeas on appeal, except that such bail bond shall not operate as a supersedeas in so far as concerns the issuance of execution to collect the fine imposed, unless a further proper supersedeas bond shall be given for that purpose, and that said defendant have such other and further relief as may be necessary and proper in the premises.

Dated: This 28th day of July, 1933.

Horace J. Brown—
Petitioner.

H. L. CARNAHAN,
W. E. SIMPSON,
J. E. SIMPSON,
By J E. Simpson
Attorneys for Petitioner.

[Endorsed]: Filed Jul 28 1933 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk

[TITLE OF COURT AND CAUSE.]

PETITION FOR APPEAL

To the Honorable George Cosgrave, Judge of the above entitled court:

Fred Shingle, the petitioner in the above entitled cause and a defendant therein, respectfully shows that on December 4, 1931, the Grand Jury for the United States District Court for the Southern District of California, Central Division, returned an indictment against your petitioner containing fifteen counts, the first fourteen of which charged your petitioner with devising a scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises and with using the United States mails for the purpose of executing said scheme, and the fifteenth count of which purported to charge your petitioner with the other defendants with having conspired to use the United States mails in furtherance of a scheme to defraud, and your petitioner having entered a plea of not guilty to said charges, and having been placed upon his trial upon said plea, a verdict of guilty was rendered against your petitioner, Fred Shingle, upon the twelfth count of said indictment, the same being criminal case No. 10,679-M of the records of said court, and a verdict of not guilty upon the remaining counts of said indictment, and on the said verdict of said jury in said cause, judgment was thereupon pronounced on the said defendant and petitioner, Fred

Shingle, that he be imprisoned in the County Jail for a period of one year and fined $1000.00, which said judgment was rendered on the verdict of the said jury in the said cause against the said defendant, Fred Shingle, and the said defendant deeming himself aggrieved by the said verdict, judgment and sentence rendered herein, and deeming that the said record and proceedings in the said cause and the said judgment and sentence contained certain manifest errors which have intervened to the great prejudice of the said defendant, which errors are specified in the Assignments of Error filed herewith and to be supplemented and amended,

Now, therefore, the said defendant, Fred Shingle, does hereby appeal from the verdict, judgment and sentence made and entered in the United States District Court for the Southern District of California, Central Division, to the United States Circuit Court of Appeals for the Ninth Circuit, and petitions the said District Court for an order allowing said defendant to appeal to said United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the Assignments of Error which is filed herewith, and in such amended or supplemental Assignments of Error as shall be made and filed herein after the making of the order allowing this appeal, and he prays that this appeal may be allowed and that a transcript of the records, proceedings, evidence and exhibits upon which the said order allowing the appeal is made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Your petitioner further prays that the said Court make and enter an order allowing said appeal, and enter a stay of execution of the judgment and sentence of imprisonment, and that your petitioner be released on bail, upon the execution of a bond in a sum to be fixed herein and conditioned, according to law, to operate as a supersedeas on appeal, except that such bail bond shall not operate as a supersedeas in so far as concerns the issuance of execution to collect the fine imposed, unless a further proper supersedeas bond shall be given for that purpose, and that said defendant have such other and further relief as may be necessary and proper in the premises.

Dated: This 28th day of July, 1933.

Fred Shingle
Petitioner.

H. L. CARNAHAN,
W. E. SIMPSON,
J. E. SIMPSON,
By J E. Simpson
Attorneys for Petitioner.

[Endorsed]: Filed Jul 28 1933 R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk

[Title of Court and Cause.]

PETITION FOR APPEAL

——oOo——

TO THE HONORABLE GEORGE COSGRAVE, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION:

NOW COMES JOHN McKEON, defendant in the above entitled cause, and feeling himself aggrieved by the verdict of the jury and the judgment of the District Court of the United States, in and for the Southern District of California, Central Division, entered on the 28th day of July, 1933, adjudging him guilty of the crime of conspiracy, as charged in the Fifteenth (15th) Count of the indictment herein, and herewith presents his assignment of errors and petitions for an order allowing him, said defendant, to prosecute an appeal from said judgment to the United States Circuit Court of Appeals, for the Ninth Circuit; that said appeal may be made a supersedeas and that your petitioner be released on bail in an amount to be fixed by the Judge thereon pending the final disposition of this appeal; that such bail bond shall not operate as a supersedeas, in so far as concerns the issuance of executions to collect the fines imposed, unless proper supersedeas bonds are given for that purpose.

JOHN McKEON
John McKeon
A L Abrhams
A G Divet
N S McCarthy
His Attorneys

[Endorsed]: Filed Jul 28 1933 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk

[Title of Court and Cause.]

PETITION FOR APPEAL

TO THE HONORABLE GEORGE COSGRAVE, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION:

NOW COMES ROBERT S. McKEON, defendant in the above entitled cause, and feeling himself aggrieved by the verdict of the jury and the judgment of the District Court of the United States, in and for the Southern District of California, Central Division, entered on the 28th day of July, 1933, adjuding him guilty of the crime of conspiracy, as charged in the Fifteenth (15th) Count of the indictment herein, and herewith presents his assignment of errors and petitions for an order allowing him, said defendant, to prosecute an appeal from said judgment to the United States Circuit Court of Appeals, for the Ninth Circuit; that said appeal may be made a supersedeas and that your petitioner be released on bail in an amount to be fixed by the Judge thereon pending the final disposition of this appeal; that such bail bond shall not operate as a supersedeas, in so far as concerns the issuance of executions to collect the fines imposed, unless proper supersedeas bonds are given for that purpose.

ROBERT S. McKEON
Robert S. McKeon
A L Abrhams
A G Divet
His Attorneys

[Endorsed]: Filed Jul 28 1933 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk

[TITLE OF COURT AND CAUSE.]

PETITION FOR APPEAL

1. E. BYRON SIENS, petitioner, is one of the defendants in the above entitled cause.

2. On the 4th day of December, 1931, in the District Court of the United States, for the southern District of California, Central Division, an indictment against your petitioner having been returned, a verdict of guilty was rendered against your said petitioner and your said petitioner was thereupon sentenced to

Five years on count 2

Fives years on count 6 concurrent

Two years on count 15 concurrent with count 2

and to pay *of* fine of *Fifteen Thousand 00/100 Dollars, $15,000.00)* in which sentence and judgment and prior proceedings there are manifest errors, which are specified in detail in the Assignment of Error filed herewith by adoption, jointly and severally on behalf of your petitioner and other defendants, and your petitioner herewith adopts each and every assignment so made and hereby specifically referred to in his Assignment of Error.

WHEREFORE, your petitioner prays that an order be made allowing him to appeal from said sentence and judgment to the Circuit Court of Appeals of the Ninth Circuit, and that said appeal shall operate as a supercedeas, that a bond shall not operate as a supercedeas insofar as

concerns the issuance of execution to collect the fine imposed, unless a proper supercedeas Bond is given for that purpose, until said appeal shall be finally disposed of, and all further proceedings be suspended and stayed until the determination of said appeal, and that your petitioner be released on bail in an amount to be fixed herein, pending final disposition of said Appeal.

Dated this 28th day of July, 1933.

E. Byron Siens

Petitioner

Buel R. Wood

Attorney for Petitioner.

[Endorsed]: Filed Jul 28 1933 R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk

---

[Title of Court and Cause.]

PETITION FOR APPEAL

1. WILLIAM J. CAVANAUGH, petitioner, is one of the defendants in the above entitled cause.

2. On the 4th day of December, 1931, in the District Court of the United States, for the southern District of California, Central Division, an indictment against your petitioner having been returned, a verdict of guilty was rendered against your said petitioner and your said petitioner was thereupon sentenced to

One year in County Jail

and to pay *of* fine of Three Thousand 00/100 Dollars, $3,000.00) in which sentence and judgment and prior proceedings there are manifest errors, which are specified in detail in the Assignment of Error filed herewith by adoption, jointly and severally on behalf of your petitioner and other defendants, and your petitioner herewith adopts each and every assignment so made and hereby specifically referred to in his Assignment of Error.

WHEREFORE, your petitioner prays that an order be made allowing him to appeal from said sentence and judgment to the Circuit Court of Appeals of the Ninth Circuit, and that said appeal shall operate as a supercedeas, that a bond shall not operate as a supercedeas insofar as concerns the issuance of execution to collect the fine imposed, unless a proper supercedeas Bond is given for that purpose, until said appeal shall be finally disposed of, and all further proceedings be suspended and stayed until the determination of said appeal, and that your petitioner be released on bail in an amount to be fixed herein, pending final disposition of said Appeal.

Dated this 28th day of July, 1933.

William J. Cavanaugh
Petitioner

Buel R. Wood
Attorney for Petitioner.

[Endorsed]: Filed Jul 28 1933 R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk

[Title of Court and Cause.]

PETITION FOR APPEAL

1. ALFRED G. WILKES, petitioner, is one of the defendants in the above entitled cause.

2. On the 4th day of December, 1931, in the District Court of the United States, for the southern District of California, Central Division, an indictment against your petitioner having been returned, a verdict of guilty was rendered against your said petitioner and your said petitioner was thereupon sentenced to

Five years on count 2

Five years on count 6

Two years on count 15

and to pay *of* fine of Twenty Thousand 00/100 Dollars, $20,000.00) in which sentence and judgment and prior proceedings there are manifest errors, which are specified in detail in the Assignment of Error filed herewith by adoption, jointly and severally on behalf of your petitioner and other defendants, and your petitioner herewith adopts each and every assignment so made and hereby specifically referred to in his Assignment of Error.

WHEREFORE, your petitioner prays that an order be made allowing him to appeal from said sentence and

judgment to the Circuit Court of Appeals of the Ninth Circuit, and that said appeal shall operate as a supercedeas, that a bond shall not operate as a supercedeas insofar as concerns the issuance of execution to collect the fine imposed, unless a proper supercedeas Bond is given for that purpose, until said appeal shall be finally disposed of, and all further proceedings be suspended and stayed until the determination of said appeal, and that your petitioner be released on bail in an amount to be fixed herein, pending final disposition of said Appeal.

Dated this 28th day of July, 1933.

Alfred G. Wilkes
Petitioner

Buel R. Wood
Attorney for Petitioner.

[Endorsed]: Filed Jul 28 1933 R. S. Zimmerman Clerk By Edmund L. Smith, Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

UNITED STATES OF AMERICA,	)	No. 10679-M
Plaintiff,	)	
-vs-	)	ASSIGNMENTS OF ERROR AS AMENDED
ALFRED G. WILKES, et al.,	)	AND SUPPLEMENTED.
Defendants.	)	
	)	

Come now the defendants, Alfred G. Wilkes, E. Byron Siens, John McKeon, Robert McKeon, Maurice C. Myers, William J. Cavanaugh, Fred Shingle, and Horace J. Brown, the appealing defendants in the above-entitled action, by and through their respective attorneys, and file and present to the court, by leave of court first had and obtained, their joint and several assignments of error as amended and supplemented pursuant to order of the above-entitled court and of the United States Circuit Court of Appeals for the Ninth Circuit, whereby the said defendants, as appellants, each separately for himself, assign as error in the record and proceedings of the District Court of the United States within and for the Southern District of California, in the above-entitled cause, the following particulars and errors, towit:

1. That the Court erred in overruling the separate demurrers of these defendants to the indictment and particularly to counts two, six, eight and twelve thereof made upon the ground that each and every count of the said indictment failed to allege facts sufficient to constitute a public offense under the laws of the United States of America in that they failed to inform the accused of the nature and cause of the accusations against them in ordinary and concise language with such certainty as to enable them to understand the charges and prepare their defense to each and every charge contained therein and is therefore repugnant to the Sixth Amendment to the Constitution of the United States.

2. The Court erred in overruling the demurrer of the defendants, Alfred G. Wilkes, E. Byron Siens, William J. Cavanaugh, John McKeon and Robert McKeon to the fifteenth count of the indictment, made upon the grounds that the said fifteenth count of the indictment failed to allege facts sufficient to constitute a public offense under the laws of the United States of America.

3. The Court erred in overruling the demurrer of the defendant, Maurice C. Myers, to the eighth count of the indictment made upon the ground that the said eighth count of the said indictment did not inform the accused of the nature and cause of the accusations against them in ordinary and concise English language with such certainty as to enable the defendant to understand the charge and prepare their defense and is repugnant to the Sixth Amendment to the Constitution of the United States of America.

4. That the Court erred in, overruling and denying, and in proceeding with the trial of the above-entitled cause after the presentation and filing of, the affidavit of personal bias and prejudice executed by the defendant E. Byron Siens and joined in by the defendants John McKeon, Robert S. McKeon, Maurice C. Myers, Alfred G. Wilkes, E. Byron Siens, Fred Shingle, and Horace J. Brown, which said affidavit of personal bias and prejudice alleged facts showing that the said defendants believed that the said Honorable George Cosgrave, Judge of the United States District Court for the Southern District of California, before whom the said cause was to be tried, entertained and had a personal bias and prejudice against the defendants and each of them, and had and entertained a personal bias and prejudice in favor of the plaintiff herein, the United States of America, who was the opposite party to the action.

5. That the Court erred in overruling the third ground of demurrer interposed by the defendants Alfred G. Wilkes, Fred Shingle, and Horace J. Brown, made upon the ground that the United States District Court for the Southern District of California had no jurisdiction over the alleged offenses pleaded in any count of the indictment, and that any jurisdiction over any of said alleged offenses appeared to be in the northern judicial district of the State of California.

6. That the Court erred in overruling the demurrers of the defendants Alfred G. Wilkes, Fred Shingle, and Horace J. Brown, made upon the grounds that each and every count of the said indictment was duplicitous, and that it appeared therefrom that each and every count

attempted to charge the defendants with more than one offense in the same count, towit, with an offense alleged to have been committed in San Francisco, California, and one sought to be alleged as having been committed in the southern judicial district of California.

7. That the Court erred in overruling the demurrers of the defendants Alfred G. Wilkes, Fred Shingle, and Horace J. Brown, made upon the grounds that each and every count of said indictment was general, vague, indefinite, uncertain, ambiguous and unintelligible in the following respects:

(6-b) That it cannot be ascertained from the said indictment when or whether any of the persons described in the said indictment as "the persons to be defrauded" became stockholders of the Italo American Petroleum Corporation and/or the Italo Petroleum Corporation of America by reason of any of the things alleged in said indictment as constituting a part or parts of the "scheme or artifice", or by reason of any of the false and fraudulent pretenses, representations, statements and promises set forth in the said indictment.

6-(e) (3) In what respect the conduct of those defendants who were not officers or directors of said corporation was "wrongful" in receiving for their own use and benefit 80,000 shares of the capital stock of the said corporation; (4) how or in what respect or manner the receipt of the said 80,000 shares of stock could be or was to the detriment of the persons to be defrauded who were not stockholders at the time of said transaction; (5) whether the said 80,000 shares of stock of the said corporation was the property of the Italo Petroleum Corporation of

America, or whether it was issued, outstanding personally owned stock, or from whom the said stock was received and by whom; nor does it appear therefrom how or in what manner said transaction was as to the said corporation unjust and/or unreasonable at the time it was authorized and/or approved.

6-f That it does not appear, nor can it be ascertained from said indictment, particularly from that paragraph thereof beginning on page three, line 32, and ending on page four, line 25 (3) what is meant by the terminology "a consideration far in excess of the actual value of the said assets" (4) what is meant by the terminology "the actual value of the assets" or what the actual value of the assets was; (5) what the reasonable market value was of the "600,000 shares of the common stock of said corporation and 600,000 shares of the preferred stock of said corporation", or what the remainder was of which the 600,000 shares of preferred and common stock was "a part of the purchase price therefor", or what the reasonable market value was of such remainder of said purchase price; (6) which of the defendants are meant by "some of the defendants", page 4, line 14; or wherein or in what respect it was "wrongful" for "some of the defendants" to receive part of the "said stock so issued for the purhase of the assets of the said Brownmoor Oil Company"; or what part of said stock was received by these particular defendants; or wherein it was "unlawful" for "some" or any of the defendants to receive proceeds from the sale of stock of the Italo Petroleum Corporation of America, it not appearing whether said stock was treasury stock or stock owned by the defendants individually.

6-g (2) It does not appear from said indictment beginning on page four, line 26, and ending on page six, line 1, (2) it does not appear therefrom, nor can it be ascertained therefrom, how these defendants could have received any part of 600,000 shares of stock that had been issued and delivered to the Brownmoor Oil Company unless it was received by them from the Brownmoor Oil Company or persons who *wer* stockholders of the Brownmoor Oil Company, nor how any of these defendants could have distributed to themselves stock which had been issued and delivered to the Brownmoor Oil Company; (3) what is meant by the term "some of said stock", page 5, line 30, or "to what persons", page 5, line 30; or whether such "other persons" were stockholders of the Brownmoor Oil Company, or how much stock each of the defendants who received any of the same received, or whether they received it from the Brownmoor Oil Company, or from stockholders of the Brownmoor Oil Company, or whether they received it as the nominees of the Brownmoor Oil Company stockholders.

6-h. It does not appear from said indictment or any count thereof, nor can it be ascertained therefrom and particularly from that paragraph appearing on page 6, lines 2 to 22 inclusive: (3) Whether the "reasonable market value" of the 6,000,000 shares of stock of the said Italo Petroleum Corporation of America referred to in said paragraph was less or more than the $3,500,000 paid for it (page 6, lines 13 and 14); (4) how or why it was "wrongful" for any members of the syndicate to receive profit from the sale of stock acquired and paid for by the syndicate (page 6, lines 15 to 18); how or in what manner the knowledge or consent of stockholders

could have been material; (5) whether any of the "persons to be defrauded" were stockholders at the time of said transaction; or how it was to the "detriment of those persons to be defrauded who were then and there", or "who should thereafter become" stockholders of said corporation; or that the transaction described in said paragraph was not a sale or whether what was done was done pursuant to an agreement and if so whether the agreement was unfair and unjust to the corporation at the time it was approved and/or authorized.

6-i (4) What was the reasonable market value of the 4,500,000 shares of stock, or of what the balance of the consideration consisted or its reasonable market value; (5) what is meant by the terminology "a consideration far in excess of the actual value of said assets", page 7, line 1; (6) it does not appear therefrom, nor can it be ascertained therefrom, that the said transaction and contract was in any way a violation of the provisions of the Civil Code of California, Section 311.

(6-p) That it cannot be ascertained from said indictment what is meant by the terminology "was not properly and efficiently managed and had not made profitable acquisitions", by the allegations "that the said development program of said Italo Petroleum Corporation of America in the acquisition of the holdings of the said Italo American Petroleum Corporation and the contract to purchase the properties of the said McKeon Drilling Co. Inc. was not a sound development program, or wherein or why it was not a sound development, nor how, or in what manner, the said Italo Petroleum Corporation of America was not properly and/or efficiently managed and/or had not made

profitable acquisitions, or what is meant by the terminology "of the world famous Trumble petroleum refining patents" nor can it be ascertained therefrom what is meant by the terminology "one of the soundest investments" lines 6 and 9, page 10, or when or by whom said representation was made or in what respect the securities of the Italo Petroleum Corporation of America were not a sound investment.

6-(q) That it does not appear therefrom that any of the said alleged "false representations" bearing numbers 1, 2, 3, 4, and 5, appearing on pages 8, 9, and 10 of the said indictment were made to any of the "persons to be defrauded" or whether any of the "persons to be defrauded" parted with their money and property as the result of the making of any of said representations to them; or by whom or in what manner said representations were made.

8. That the Court erred in overruling the demurrer of the defendants made upon the ground that each and every count of the indictment failed to state a public offense under the laws of the United States for the reason that the letters therein alleged to have been placed in the United States mails could not have been for the purpose of executing any scheme or artifice to defraud sought to be pleaded in the indictment and said letters probably could not have been of any effect in the execution or furtherance of an alleged scheme to defraud.

9. That the Court erred in abuse of its discretion in denying the separate motions of the defendants Fred Shingle and Horace J. Brown for a Bill of Particulars, and particularly paragraph 5 thereof which requested that

they be advised whether any of the persons named in the various counts of the indictment as "the persons to be defrauded" were actually defrauded by means of the alleged scheme, and if so, give the names of "such persons to be defrauded".

10. That the Court erred in abuse of its discretion in denying the separate motions of the defendants Fred Shingle and Horace J. Brown for a Bill of Particulars in which they requested to be advised as follows:

6. Were all of the defendants the originators and/or formers of the alleged "scheme and/or artifice" to defraud referred to in Counts 1 to 14 inclusive of the indictment, and of the conspiracy pleaded in Count 15, or was the scheme and conspiracy formed by some of the defendants and later joined by others of the defendants.

7. If the alleged scheme and/or artifice to defraud and conspiracy originated with less than all of the defendants and the others joined subsequent to the formation thereof, give the names of the originators and the date thereof, and the names of those defendants who subsequently joined the conspiracy, together with the approximate date the said defendants joined the said scheme and/or conspiracy.

11. That the Court erred in abuse of its discretion in denying the separate motions of the defendants Fred Shingle and Horace J. Brown for a Bill of Particulars with respect to the following requests contained therein:

12. Do the things alleged in the various paragraphs of the first and subsequent counts of the indictment as being a "part" and "further a part of said scheme and artifice" constitute all of the parts of the whole scheme,

artifice and conspiracy, or are some of the "parts" of the alleged scheme, artifice and conspiracy omitted from the indictment.

13. If "parts" of the alleged scheme, artifice and conspiracy are omitted from the indictment furnish these defendants with those missing "parts".

12. That the Court erred in abuse of its discretion in denying the following requests contained in the motion for a Bill of Particulars filed on behalf of the defendants Fred Shingle and Horace J. Brown.

30. In what respect was it "wrongful" for any of the defendants who were not officers or directors of the Italo Petroleum Corporation of America to receive stock for the making of the loan of Eighty Thousand Dollars ($80,000.00) as alleged in the paragraph page 3, lines 19 to 31 inclusive.

32. Who were the owners of the stock delivered as the bonus. (Indictment, page 3, lines 19 to 31 inclusive.)

35. How, or in what respects, was the making of the loan of Eighty Thousand Dollars ($80,000.00) and/or the receipt of the said eighty thousand (80,000) shares of stock referred to on page 3, lines 19 to 31, inclusive, a detriment to those of the persons to be defrauded; (a) who were then stockholders, and/or (b) who should thereafter become stockholders of the Italo Petroleum Corporation of America, (c) if the said stock was not corporate stock unissued from the treasury of the Italo Petroleum Corporation of America.

46. In what respect was it "wrongful" for those defendants who received any of said stock, to do so, (indictment page 4, lines 15 to 18 inclusive)

49. In what respect or respects was it "unlawful" to receive proceeds from the sale of said stock. (Indictment page 4, lines 17 to 25 inclusive.)

53. How were the stockholders of the Italo Petroleum Corporation of America defrauded, or how was it to their detriment, for stock in said company which had been issued delivered to the Brownmoor Oil Company to be delivered to any of the defendants.

54. Was any of the stock of the Italo Petroleum Corporation of America delivered to any of the defendants, page 5, line 21 to page 6, line 1 inclusive, delivered to them as the nominees or representatives of persons who were stockholders of the Brownmoor Oil Company, or was any of said stock delivered to said defendants by persons who were stockholders of the Brownmoor Oil Company.

60. In what respects was it "wrongful" for any members of the syndicate to receive profits derived from the sale of the said six million (6,000,000) shares of stock or any part thereof, as referred to in the indictment, page 6, lines 14 to 22 inclusive.

61. In what respects, if any, was it wrongful for any members of the syndicate who were not officers or directors of the Italo Petroleum Corporation of America to receive profits derived from the sale of any part or all of the six million (6,000,000) shares of stock referred to in the indictment, page 6, lines 14 to 22 inclusive.

65. What is meant by the terminology "actual value of said assets", page 7, line 1.

66. What were those "certain assets of the said McKeon Drilling Co. Inc.", referred to in the indictment, page 6, lines 30 to 32 inclusive.

67. What was the reasonable market value of those "certain assets of the said McKeon Drilling Co., Inc." (Indictment, page 6, lines 30 and 31), and of "said assets", page 7, line 1.

70. What was the reasonable market value of the consideration which the McKeon Drilling Co., Inc. agreed to pay and deliver to Italo Petroleum Corporation of America in return for four million five hundred thousand (4,500,000) shares of its capital stock, at the time of the making of the contract referred to in the paragraph beginning page 6, line 23, and ending page 7, line 4.

71. What was the prevailing market price, if any, and if not, the market value, per share of the four million five hundred thousand (4,500,000) shares of capital stock of the Italo Petroleum Corporation of America, involved in the transaction referred to on page 6, line 23 to page 7, line 4 inclusive.

75. Which, if any, of the defendants did not have knowledge of or participate in a "secret agreement and arrangement" referred to in the indictment, page 7, line 5 to line 17.

86. Which of the "said persons to be defrauded" bought stock of the Italo American Petroleum Corporation believing that dividends which had been paid were paid out of net earnings of the said company when in fact said dividends had been paid out of capital.

88. To whom, when, and how much in dividends was paid to "any of the persons to be defrauded" out of the capital of the Italo American Petroleum Corporation as alleged in the indictment, page 8, lines 14 to 22 inclusive.

90. Were the numbered representations bearing numbers 1 to 5 inclusive appearing in the indictment, page 8, line 30 to page 10, line 10 inclusive, verbal or written, and if written identify the writing, its date, its name, if any, and the person or persons to whom it was sent or delivered, with respect to each writing.

91. Did any of the persons to be defrauded part with their money or property as the result of the making of any of the said representations referred to in request number 90.

92. Were the numbered representations 1 to 5 inclusive contained in the indictment, page 8, line 30 to page 10, line 10 made in the identical, language in which they are set forth in the indictment, and does the said indictment plead the whole context of such statement.

13. That the Court erred in denying the motion of the defendants Fred Shingle and Horace J. Brown for a separate trial, made upon the ground that they would be prejudiced by the reception in evidence of evidence which may be competent and admissible against some defendants and concerning which they had no knowledge, and upon the further ground that they would be prejudiced in their defenses by reason of certain prejudice existing in the minds of the Judges of the United States District Court for the Southern District of California against certain of the defendants and would therefore be unable to receive a fair and impartial trial on a joint trial with the remaining defendants in the said cause.

14. That the Court erred in overruling and denying the motions of each of these defendants for a new trial in this cause, over their exceptions at the time.

15. The court erred in overruling and denying the motions of each of these defendants in arrest of judgment.

16. The Court erred in overruling the demurrer of all of these defendants to the testimony introduced.

17. The Court erred in refusing and denying the motion made by each of these defendants to direct a verdict of not guilty as requested by each defendant at the close of all of the testimony introduced by the plaintiff, for the reason that said and such testimony failed to make out and prove any offense, committed by any of the said moving defendants against the laws of the United States of America, over the exceptions of each defendant at the time.

18. That the Court erred in overruling and denying the motions and requests of each of these defendants offered to the court at the close of all of the testimony introduced in the entire case, wherein and whereby each defendant requested the court to direct the jury to return a verdict of not guilty as to each and every defendant separately, for the reason that under the law and the evidence in the case, no offense was proven to have been committed by either or any of these defendants against the laws of the United States to the refusal of which said requests exceptions were then and there taken by each defendant.

19. The Court erred in overruling and denying defendants' objections to the introduction of any evidence made upon the ground that the scheme and artifice to defraud alleged in the indictment had been fully consummated and executed prior to the mailing of any of the letters, circulars, or mail matter set forth and pleaded in Counts Two, Six, Eight and Twelve of the indictment,

and said mail matter could therefore not have been mailed during the existence of any scheme or artifice to defraud charged in the indictment or for the purpose of executing the same.

20. The Court erred in overruling and denying the objections made by each and all of these defendants to the introduction of any testimony under the Fifteenth Count of the indictment upon the grounds and for the reasons that the Fifteenth Count of the indictment did not state facts sufficient to constitute a public offense under the laws of the United States.

21. The Court erred in overruling and denying the objections of each and all of these defendants to the introduction of any evidence under the Fifteenth Count of the indictment made upon the grounds and for the reasons that the so-called conspiracy pleaded in said count of the indictment had been fully executed and consummated prior to the commission of any overt act.

22. That the Court erred in overruling the defendants objections to the introduction of any evidence whatsoever, and in denying the motions made by defendants to exclude all testimony in the case, upon the ground that the scheme or artifice to defraud pleaded in the indictment, and the conspiracy alleged in the Fifteenth Count of the indictment, were completely executed prior to December 1, 1928, and that all of the letters pleaded in the various counts of the indictment were mailed after the completion of the scheme and conspiracy and could not have been mailed in execution thereof.

23. That the Court erred in overruling the objections of defendants to the admission in evidence of Exhibit 3,

which purported to be the Minute Book of the Italo American Petroleum Corporation identified by the witness, Courtney L. Moore, who testified that the first 52 pages of the said Exhibit 3 were re-written minutes, which said objection interposed by the defendants was as follows:

Objected to by defendants as incompetent, irrelevant, immaterial, no foundation laid, because not shown that the witness had personal knowledge of the contents of the book or that he was personally present at any meeting of the Board of Directors, and hearsay as to all persons not shown to have been present and participating in the meeting, and not binding on any defendant who was not present and participated in the meetings. Objection overruled. Exception. The Minute Book was marked Exhibit "3".

The minutes appearing at page 23 of exhibit 3 were read by the District Attorney and recited that a resolution was passed by the Board of Directors of Italo American Petroleum Corporation declaring a dividend to be paid by that corporation.

24. That the Court erred in overruling the objections of defendants to the admission in evidence of, and in refusing to strike from the evidence, the exhibits hereinafter numbered which purported to be the books of account and records of the Italo American Petroleum Corporation, which said books of account were identified as follows, and received in evidence over the following objection. The witness Ida M. Screttini, after testifying that she was employed by the Italo American Petroleum Corporation as a bookkeeper from February 1927 to August 1930, identified Exhibit 6 for identification as the Operating

Ledger of Italo American Petroleum Corporation and Italo Petroleum Corporation of America kept by that company in the usual course of business in which she made entries, gave similar testimony with respect to Exhibit 8 for identification identified as a general ledger of the Italo American Petroleum Corporation and Italo Petroleum Corporation of America; identified Exhibit 9 for identification as the Trial Balance Book for the years 1927, 1928, and 1929 prepared by her from Exhibits 6 and 8. The witness gave similar testimony respecting Exhibit 5 for identification labeled "General Ledger, Cash Received, Cash Disbursed and Operating Ledger Italo American Petroleum Corporation and Italo Petroleum Corporation of America 1926, 1927, 1928, and 1929". The said Exhibits 5, 6, 8, and 9 for identification were offered and received in evidence over objection and exception that they were incompetent, irrelevant and immaterial, no proper foundation laid, not binding upon any of the defendants who were not mentioned in connection with the said books, not binding upon any of the defendants, they being records of a corporation binding only on the corporation and not on the individuals, and no showing that any of the defendants had any knowledge of the contents of any of the said books of account before the court. The said objections were overruled and exceptions noted. The said books of account were received in evidence and were used as the basis for the testimony of the witness James F. Hynes, Government Accountant.

The witness Emma Baldocchi identified Exhibit 7 for identification as one of the books used by her in her employment by the Italo American Petroleum Corpora-

tion of 1924 to February 1927, it being labeled "General Ledger Italo American Petroleum Company". She also identified Exhibits 10, 12 and 13 for identification as records of Italo American Petroleum Corporation kept in the usual course of business. The said exhibits were offered in evidence and were objected to by defendants as incompetent, irrelevant and immaterial, not binding upon any of the defendants, and no proper foundation laid. The said objections were overruled, exceptions noted and the books were received in evidence bearing the same exhibit numbers, and were financial records of Italo American Petroleum Corporation and used as a basis for the testimony for the Government Accountant, James F. Hynes.

25. That the Court erred in overruling the objections made to the following testimony given by the witness Douglas Fyfe and in denying the motions made by defendants to strike and limit said testimony, all of which was done over the objections and exceptions of the defendants as follows, towit:

"I had a conversation with Mr. Perata in San Francisco about October 15, 1927, in the presence of Mr. Moore. He informed me that a broker, Mr. Frederic Vincent, had suggested that Alfred Wilkes be brought into the company to get it in better shape. Both Mr. Moore and Mr. Perata expressed some doubt as to the advisability of such a step, and asked me what I knew about Mr. Wilkes. I told them that I only knew Mr. Wilkes by reputation, that he had a reputation for being a promoter.

Objected to as incompetent, irrelevant and immaterial as to the reputation of any one of these defendants. That is not at this time in issue, regardless of whether it is a

part of the conversation that might otherwise be admitted, so I move the court to strike that statement of the witness out. Objection overruled. Exception.

THE COURT: All of the testimony of this witness outside of the presence of the persons he designated is admissible only as against those who particularly were involved up to this time, but it may later involve others, of course, depending on what the future evidence is. Exception.

Q. Will you proceed with the conversation where you left off, Mr. Fyfe.

A. They were expressing some doubt about the advisability of this step, and asked my opinion. I stated that I did not know Mr. Wilkes personally, but I did know of him by reputation; that his reputation was that of a pure promoter. I think I used the term "unscrupulous".

MR. WOOD: I move that the language "I think I used the term "unscrupulous" be str*ik*en out and that the jury be instructed not to consider it. It is purely an opinion of the witness.

THE COURT: Yes, that should be definite, and the motion is granted, and the jury is so instructed. Further explain, Mr. Fyfe, what did you mean by saying you think?

A. That is my memory of the conversation.

THE COURT: Very well.

THE WITNESS (Continuing) And I believe I cited several things that I had heard about Mr. Wilkes. One thing that I remember telling them was that at one time I had been employed by an Englishman, the manager of the California Amalgamated Oil Company, which had

some properties in the San Joaquin Valley. This gentleman had spent some time expressing to me his opinion of Mr. Wilkes."

26. That the Court erred in overruling the objections hereinafter set forth to the testimony of the witness Douglas Fyfe and in denying the hereinafter set forth motions to strike the same from the record, all of which was to the prejudice of these defendants.

"I had a conversation with Mr. Perata at the Biltmore Hotel in Los Angeles.

Q. What was that conversation, please?

A. Mr. Perata had called me into the room in the Biltmore and asked me how I thought things were going along with the Italo Company. I told him quite frankly that I thought the Italo was getting in very bad shape, that it was generally rumored that the Italo was buying properties at prices very much more than their value.

MR. WEST: Object to the answer so far as to what rumors occurred as being hearsay.

Objection overruled. Exception.

A. That men of very bad reputation were being brought into the company. The company was getting a very bad name, and that if he was not careful, the result would be that he and his Italian stockholders would suffer heavy losses. Mr. Perata told me that he realized that the men he was dealing with were, I think, if I may use the expression, pretty tough customers, but that he was watching them and that they wouldn't put anything over on him.

Q. In that conversation was anything said as to the names of the persons who were being brought into the Italo Petroleum Corporation of America by Mr. Wilkes?

MR. DIVET: Objected to as immaterial, and having a tendency indirectly to go into the question of reputation of the defendants and not at all necessary to the end of the inquiry being pursued by the Government.

THE COURT: Overruled.

Exception.

A. Yes, there were some names mentioned.

Defendants moved to strike out all of the testimony of this witness with regard to the conversation held at the Biltmore Hotel as being wholly immaterial to any charge or issue in this case as to the reputation of anyone. It is immaterial whose names might have been mentioned. It has indirectly reflected upon men who are under indictment here, and their reputation is not in issue unless they put it in issue themselves, and it is wholly immaterial for this witness to be permitted to state, to give a conversation and through some conversation give his opinion and statements and rumors concerning the reputation of anyone. We move to strike out all of the testimony concerning the conversation at the Biltmore Hotel, because the reputation of any defendant here is not at issue until we make it so ourselves.

THE COURT: Motion denied.

Exception.

27. That the Court erred in admitting in evidence Exhibits 16-A, B and C, which purported to be the minute books of the Italo Petroleum Corporation of America from March 1928 to February 1931, and in denying the motion to strike the said minute books from evidence. The said objections and motions were made in connection with the testimony of the witness Robert McLachlen as follows. The witness testified that he began

keeping the minutes of the Italo Petroleum Corporation of America, April 18, 1929, which are contained in Exhibit 16-B for identification. He became a director of said corporation October 16, 1928, and had no personal knowledge of any of the matters that were recorded in said minute book prior to the time that he began keeping the said minutes, April 18, 1929. That said minute books, Exhibit 16-A, B and C for identification were offered in evidence and were objected to upon the following grounds:

MR. WEST: We object on the ground it is incompetent, irrelevant, and immaterial, not binding on any of the defendants, hearsay, no proper foundation laid, no showing that the witness is qualified to testify as to the authenticity or contents or correctness of the transactions which the books purport to record or that they ever occurred; there is no showing as to the time when such entries were made with respect to the time the recorded transactions are alleged to have occurred; there is no showing that the witness has any knowledge of these transactions; no showing that any defendant had any knowledge of or connection with the transactions recorded or the entries, nor are they admissions against interest, and no showing that any scheme or artifice was devised of which they were members, and no proof of the corpus delicti up to the present time.

MR. SIMPSON: I want to add the additional objection that there is no showing by offering a minute book which may extend over a long period of time that any particular part or portion of those minutes or of that book is material so far as these proceedings are concerned, and I would suggest that if the Court is disposed to admit into evidence any part of the minute books,

that the District Attorney designate the particular parts that may be material in this case and offer them separately instead of just throwing a group in a book at you and saying that we are offering these in evidence without giving you an opportunity to know what is in the particular book. Some of the matters may be relevant, and some may not. I can not tell from the offer as made what is competent or admissible or what is not.

THE COURT: Are we up to where you have offered the three volumes?

MR. REDWINE: I am getting ready to offer the last volume now, your Honor.

THE COURT: The witness states that he kept the minutes.

MR. REDWINE: Yes, he kept the minutes after a certain period. I am identifying each particular book that we had because of the foundation or objection that might possibly arise at some time.

MR. SIMPSON: My objection goes far*ht*er than that, it is not only that question, but it is a question of the competency of all of the minutes.

THE COURT: Just a minute. The witness was made assistant secretary in April, 1929; and how long did you continue in that position?

A. Until February, 1931.

Q. BY THE COURT: And were all of these minutes made by you, written by you?

A. After the date that I designated there with the exception of several.

Q. Of one or two meetings?

A. One or two meetings.

Q. What is that date, Mr. Redwine?

MR. REDWINE: This commenced on the 29th day of July, 1930. It is a continuation. I just wanted to have him identify this book as to the fact that he kept this also, I am not questioning him concerning this book.

MR. SIMPSON: We are referring to this one here, if the Court please.

THE COURT: Yes.

MR. SIMPSON: Well, I think that the witness testified that he did not make any entries in this book until sometime in April of 1929, if I am not mistaken.

THE COURT: My understanding is from your testimony that you started keeping the minutes in April of 1929?

A. Yes, sir.

Q. BY THE COURT: And you were the one that kept the minutes from that time up to when?

A. Up to the last minutes.

Q. Yes, the last minutes. Then, all the minutes from and after April 29th recorded in the books were kept by the witness?

MR. REDWINE: Is that correct?

A. With the exception of—

THE COURT: Yes, with the exception of some of the minutes. Do you identify them, Mr. Redwine?

MR. REDWINE: I was going to identify the last group of them.

Q. BY THE COURT: But you kept the minutes correctly?

A. Yes, sir.

Q. You stated that they were minutes of the corporation used by the corporation in its business?

A. Yes.

THE COURT: All right. Let them be admitted in evidence.

MR. SIMPSON: All of the minutes in this book, if the Court please?

THE COURT: Yes.

MR. SIMPSON: Even those at which the witness was not present at a meeting?

THE COURT: All the minutes that the witness kept.

MR. SIMPSON: We don't know which they were, if the Court please. We would like to find out. We don't know.

THE COURT: Overruled.

MR. SIMPSON: There is no way of identifying that from the witness's testimony.

THE COURT: Well, his statement in answer to my question I understand to be sufficient. Objection overruled.

MR. SIMPSON: Exception.

Volumes 2 and 3 of the minute books were received in evidence and marked Exhibits 16-b and 16-c".

Thereupon government counsel offered in evidence Volume 1 of the minute books which had theretofore been marked Exhibit 16-a for identification.

MR. WEST: I make the same objection that I made a moment go.

MR. SIMPSON: And I raise the further objection that this witness is not qualified to identify books purporting to relate to transactions that were written up by somebody else or occurred long prior to a time that he ever became assistant secretary of the company, and there is no proper foundation laid for them either as to the competency of this witness or the correctness of the books or to their authenticity.

THE COURT: Overruled.

MR. SIMPSON: Exception.

The book was received in evidence and marked Exhibit 16-a.

Thereupon defendants made the following motions to strike the said minute books from evidence. The said motion was denied by the Court and exception was noted and the said ruling is hereby assigned by error.

MR. SIMPSON: Your Honor, at this time on behalf of all defendants, we move to strike from the record each and every page of the minute book which has been introduced in evidence as Exhibit 16-a, and all of the matters therein set forth, and we further move to strike from the record each and all of the minutes contained in exhibit 16-b up to April 11, 1929, and the date that Mr. McLachlen testified he became assistant secretary of the Italo Petroleum Corporation of America, and started to keep the minutes of that corporation from that date on. We move to strike, in addition to the two motions just addressed to the Court, the minutes set forth in minute books Nos. 2 and 3, Exhibits 16-b and 16-c, of all meetings at which Mr. McLachlen was not present personally,

and therefore, as he testified, has no knowledge of the matters that transpired at those meetings, upon the grounds that such testimony in each and every page of the minutes designated as to each and every specific book and page thereof, that such testimony is irrelevant, incompetent, immaterial, it is violative and in conflict with the constitutional rights guaranteed to each and every one of these defendants under the 6th Amendment to the Constitution of the United States, which provides that each and every witness has the right to be confronted with the witnesses who have personal knowledge of the matters in evidence and testified to; on the ground that it is heresay evidence, not the best evidence; it is my view of the law in California that minutes of the Board of Directors are not the best evidence. The best evidence is the verbal testimony of witnesses who were present at the meeting, and heard the things that were said and done, and the only thing that the minute book could be used for, if prepared by a person, would be to refresh his recollection, if it needed refreshing, of what may have transpired at that meeting.

It is only a narration of matters that are alleged to have transpired and with particular respect to the minutes and meetings at which Mr. McLachlin was not present; it now affirmatively appears that he has no personal knowledge whatsoever of any of the matters set forth in those minutes, or in fact that those meetings were even held. The testimony subject to the motion is also secondary evidence. There has been no proper foundation or any foundation laid for its admission in evidence. The books referred to, and the minutes, have not been shown to be accurately kept by any person; they are

the books of a corporation and not books of any defendant on trial in this action and they are therefore-*fore* not competent or admissible as admissions against the interests of any particular defendant on trial in this action. It has not been shown that any of those minutes have been properly authenticated or correctly record the transactions which they purport to record. It has not been shown that any defendant is personally acquainted with or has knowledge of any of the matters set forth in those purported minutes. There is no showing that the books are now in the same condition as they were when they left the possession of the company and were turned over to the possession of the governmental authorities. There is no showing that the books designated or the minutes therein referred to, were kept by any person whose duty or custom it was to keep such books, and to keep them properly. There is no showing that the matters therein related have been verified by any defendant on trial in this action or that he had knowledge of any matters therein set forth, or is acquainted with any of the contents of those books.

We make the motion on the further ground that there is no proof in this record of the truth of the facts set out in those minutes, in each and every one of them, or truth of the facts set out in the various instruments in those various minutes, or that those documents were properly or otherwise executed, or the execution thereof properly authorized according to law.

We further state as an additional ground that it has not been shown that any defendant in this action was a party to any of the transactions that these minutes purport to record as having taken place, and that if any

person was a party to any transaction therein set out, that that party was a corporation, either the Italo Petroleum Corporation of America, or the Italo American Petroleum Corporation, and that neither of said parties or said corporation is a party to this action or this proceeding. There is no showing that any of the matters contained in the minutes designated by me are competent or material or relate to any of the matters charged in this indictment, or that they can constitute probative value respecting any of those transactions. Neither is there any proof at this stage of this proceeding that any scheme or artifice to defraud or any conspiracy as charged in any part of this indictment was at the time set forth in these various minutes devised by any of these defendants, and the prosecution is now endeavoring to prove by the acts or declarations of the corporation, not a defendant, but of a corporation, that such matters took place, and the rule is settled that before the acts or declarations of an alleged defendant or co-conspirator can be admitted in evidence either for or against him that it must be first shown prima facie that the conspiracy or scheme charged in the indictment was devised and in existence, and then such actions or declarations are only admissible as admissions against the particular person charged with having knowingly participated therein.

There is no proof in this case at this time of any corpus delicti, and by that I mean that the corpus delicti does not exist in the devising of any scheme or artifice to defraud or in any conspiracy, but exists in the mailing of a letter or a circular set forth in the indictment pursuant to a scheme which had already been devised for and with the intention of defrauding, as charged in the

indictment, and such letter must have been mailed during the existence of that scheme and for the purpose of executing it, and as yet there is no evidence in this record whatsoever of the use of the United States Mails in the manner or form charged in the indictment.

On each and all of the grounds designated by me, we move to exclude from the evidence and to strike therefrom each and every one of the matters referred to; and that the jury be instructed to disregard all of such testimony and each and every part thereof.

THE COURT: With respect to the motion, the motion is denied now, with respect to everything except those portions of the minutes that the young man testified to that he did not write. With reference to those, I will study the matter and possibly if I am in doubt, call for further arguments on it.

The Court subsequently denied the motion as to all the minutes and an exception was allowed.

28. That the Court erred in overruling objections made by defendants to the admission in evidence of the hereinafter numbered and described exhibits, and in denying the motions of defendants to strike said exhibits from evidence, and in denying the motions of the defendants to limit the consideration of said exhibits and instruct the jury that they were only to consider them as against defendants who were shown to have knowledge of and participated in the transactions referred to therein. Said objection was made upon the following grounds, to-wit:

Defendants objected to the particular part of the books offered, referring to the so-called Brownmoor deal, upon the ground that the evidence affirmatively shows that

such entries were not made contemporaneously with the transactions in the usual course of business, but are based upon hearsay information acquired by the witness a long time subsequent to the actual transactions and there is no foundation laid for the introduction of that part of the book. Defendants further objected to the offered books upon the ground that the books are incompetent, irrelevant and immaterial. They are violative and in conflict with the Constitution rights granted by the Sixth Amendment to the Constitution, that is, that the defendants are entitled to be confronted with the witnesses against them. Three, because it is hearsay evidence. Four, because it is not the best evidence. Five, because it is secondary evidence. Six, because no proper foundation, nor any foundation has been laid for its introduction, or the introduction of any of them, or their admission into evidence. Seven, because the books and the entries therein have not been shown or proven to be accurately correct. Eight, because it has not been shown or proven that the books have been regularly kept, or the entries therein regularly made in due course of business, or at all. Nine, that the entries in said books are not authenticated. Ten, because it has not been sufficiently or at all shown that the defendants, or either of them, are acquainted with the books or the entries in, or the accounts of them, or that they know what the books contained, or what the entries therein were. Eleventh, because the books are not in the same condition as they were when it left the custody of the company and were taken possession of by the United States Government. The twelfth objection is, because there has been no showing as to what changes have been made in said books since they have left the company or

since they came into the possession of the United States Government. Because it has not been shown what additions have been made to such books as to what entries have been made therein since it passed out of the custody of the company.

Fourteen, because it has not been shown that either of the defendants has any knowledge of any entry in said books.

Fifteen, because it has not been shown or proven that the books were kept by one whose duty or custom it was to keep them.

Sixteen, because it has not been shown that the entries in the books were made contemporaneously with the facts recited in the same or contemporaneously with the happenings of the facts recited herein.

Seventeen, because there is no showing made why the person that made such entries in said books is not called to verify said entries in said books.

Eighteen, because none of the entries have been shown to have been made by any bookkeeper of the company.

Nineteen, because there is no showing or proof of any familiarity of any of the defendants, or either of them, with the books of the company, or the actual acquaintance or knowledge on the part of the defendants, or either of them, with the contents of said books, or the purport of the entries therein as being an admission or assertion of the facts stated therein.

Twenty, because there is no proof of the truth of the facts set out in said books or proof of the facts set out in the various instruments and entries in the said books, or that they were ever authorized by the defendants, or any

of them, or that they ever knew of the making of the entry of any of the instruments, entries or pages in said books.

Twenty-one, that the defendants did not and were not parties to any of the transactions set out in the books, and had no knowledge of any transactions set out in said books, and that there is no proof tending to, show that they were, or any of them was, or that they ever authorized any person to enter into the said transactions or become a party to them, or consent to it without the knowledge of them. That it does not appear that any of the entries in the books are competent or material, or related to any matters charged in the indictment, that they have any tendency to prove or disprove the allegations thereof, or that they are in any way within the issues of the case. This refers to exhibits numbered 28-A, B, C, D, 29, 31, and 33.

Objection overruled. Exception.

The books were received in evidence marked Exhibits 28-A, B, C, D, 29, 31 and 33.

All of these financial records were used as a basis for the testimony given by the Government Accountant G. S. Goshorn. These exhibits are described as follows:

Exhibit 28-A is a book labeled, "Italo Petroleum Corporation of America, Capital Ledger" for the years 1928, 1929, 1930.

Exhibit 28-B is a book of journal vouchers, Italo Petroleum Corporation of America, years 1928 and 1929.

Exhibit 28-C is a book labeled "General Ledger, Italo Petroleum Corporation of America, years 1928, 1929 and 1930."

Exhibit 28-D is a book entitled "Employees and Sundry Accounts, Italo Petroleum Corporation of America."

Exhibit 29 is a book labeled, "General Cash Receipts Italo Petroleum Corporation of America."

Exhibit 31 is a book labeled "Transfer Binder, Clay Carpenter, Receiver, Cash Receipts and Disbursements, March 1929 to December 31, 1929.

Exhibit 33 is a book labeled "Journal Vouchers year 1930."

Exhibits 34-A to 34-GGG consisting of 79 books and records purporting to be the transfer records containing the records of the transfer of the capital stock of Italo Petroleum Corporation of America.

Exhibit 35, certain ledger sheets contained in 15 packages, being ledger sheets of the Italo Petroleum Corporation of America, used for the purpose of recording stock transfers and stock issues.

29. The Court erred in overruling the objections interposed by defendants to the admission in evidence of Exhibits 41, 42, and 43, which were objected to upon the same grounds and for the same reasons set forth in assignment of error number 28, and which said exhibits 41, 42, and 43 are as follows:

Exhibit 41 is the letter set forth in overt act number 9 of the fifteenth count of the indictment.

Exhibit 42 is the letter set forth in the tenth overt act of count fifteen of the indictment.

Exhibit 43 is the letter set forth in support of the thirteenth overt act in count fifteen of the indictment.

Each of said letters refers to the distribution of Italo Petroleum Corporation of America stock owned by the McKeon Drilling Company and held in escrow by Shingle, Brown & Company.

30. The Court erred in overruling objections made to the admission in evidence of Exhibit 57 as follows:

These photostatic copies of statements were kept by the partnership of Wilkes and Cavanaugh during the period of time that I was employed there and are statements from Bacon & Brayton for Italo stock sold.

Government counsel offered the photostats in evidence and they were objected to as incompetent, irrelevant and immaterial, no foundation laid, not binding upon any of the defendants in the case and hearsay.

Objection overruled. Exception. Marked Exhibit 58.

Exhibit 58 was used in connection with the testimony of the witness G. S. Goshorn, Government Accountant.

31. The Court erred in overruling objections to the admission in evidence of Exhibits 68, 69, 70, 71 and 72, and in denying the following motions to limit said testimony, towit:

Exhibit 68 is a receipt dated October 10, 1928, signed by A. G. Wilkes, acknowledging the receipt of 50,000 shares of Italo Petroleum Corporation of America stock

from Maurice C. Myers, Trustee, to pay commissions due on properties acquired as per Corporation Commissioner's permit of August 9, 1928.

The witness identified certain letters and receipts dated October 31, November 1st, 1928, as being signed by the defendant Wilkes.

Government counsel offered the documents in evidence. They were objected to as incompetent, irrelevant and immaterial, hearsay, and no proper foundation laid.

Objection overruled. Exception. Marked Exhibit 69, and are in substance as follows:

Receipt dated October 31, 1928, signed by A. G. Wilkes addressed to Maurice C. Myers, Trustee, acknowledging 44,000 shares of Italo Petroleum Corporation of America stock to be used as directed by the trustee, together with a letter of transmittal from Myers of the said stock, and a letter of A. G. Wilkes to A. B. Lyle to issue the said stock as follows: 8,663 units to Vincent being the balance owing from the Siens stock; 10,000 shares of common to Nellie V. Holbrook for closing the Zier Oil Company deal, and the balance of 3,357 shares of common and 13,337 of preferred to William J. Cavanaugh.

The witness identified a receipt, a letter dated June 25, 1929, addressed to Peat, Marwick, Mitchell & Company, and a letter dated July 3, 1929 on the letterhead of Italo Petroleum Corporation of America, addressed to E. P. Lyons and signed by defendant Wilkes.

Government counsel offered these documents in evidence.

Objected to on the same grounds as the last three exhibits were objected to, and upon the further ground that it apparently refers to some matters relative to commissions to be paid in the acquisition of properties, there is nothing alleged in the indictment pertaining to any claimed irregularity relative to the payment of any commissions; upon the ground that the Government is attempting to offer in evidence documents or verbal testimony purporting to relate to some transactions other than the transactions that are charged in the indictment, pertaining to the receipt of commissions; and there is no allegation in the indictment concerning the receipt of any commissions under any pretense whatsoever involving the sale or exchange of the properties, upon the ground that Government must first establish that the scheme to defraud was devised, as charged in the indictment, that the mails were used and then as to a specific outside transaction relating to some other thing which is not similar to the matters charged in the indictment, which evidence can only possibly be admissible against the person therein involved upon the question of showing an intent, and to offer the document and for the court to receive it in evidence generally against all defendants as to a matter which is entirely foreign to the allegations of the indictment is highly prejudicial to the defendants; upon the further ground that the Corporation Commission has adjudged that the considerations paid for the properties were fair, just and equitable.

Objection overruled. Exception.

Defendants requested the Court to instruct the jury that the exhibits identified by the witness as having been

signed by the defendant Wilkes to be considered only as against the defendant Wilkes and not as against any other defendant in the case because they relate to transactions which are not in any way alleged in the indictment and pertain to something for which the defendants are not on trial.

THE COURT: Well, it is impossible for me to say at the present time what part in the scheme that the United States is trying to prove this letter plays and it is all subject to the general rule that it is evidence only against those shown to have been connected with it in one way or another. Proceed.

MR. SIMPSON: Exception.

The receipt was marked Exhibit 70. Letter dated June 25, 1929, was marked Exhibit 71, and the letter dated July 3, 1929, was marked Exhibit 72.

Exhibit 71 is addressed to Peat, Marwick, Mitchell & Company, dated June 25, 1929, and reads in part as follows:

"Pursuant to your request, I submit the following statement showing the certificates of stock of the Italo Petroleum Corporation of America received by me in payment of commissions due in acquiring properties and interest described in the application of said company for a permit from the Corporation Department of the State of California."

Then follows a description of certificate numbers and giving the number of shares of common stock and proceeds as follows:

"Credit. Returned to Trustee 1000 shares, delivered to Frederic Vincent & Company, 50,000 shares of common and 50,000 shares of preferred. Delivered to Louis R. Lourie 10,000 shares of common and 10,000 shares of preferred. Delivered to R. E. Toomey 30,000 shares of common, 27,000 shares of preferred. The receipts of Frederic Vincent & Company, Charles Holbrook, and R. C. Toomey are herewith exhibited to you. No receipt from Louis R. Lourie is available but you may confirm delivery of the stock to him by noting transfer of the certificate of 10,000 units to Mr. Lourie's secretary in August 1928 on the day following delivery of the stock to him. The commission first above mentioned includes the Cat-Canyon group of leases covering 800 acres near Santa Maria and all commissions mentioned should be apportioned among all properties mentioned in the application for permit except the McKeon and Graham-Loftus properties.

Very truly yours,

A. G. Wilkes".

Exhibit 70 is as follows:

Receipt dated August 19, 1928 signed by A. G. Wilkes and acknowledging the receipt of 50,000 units of Italo Petroleum Corporation of America stock from Maurice C. Myers, Trustee, to be delivered in payment of commissions due in acquiring properties described in the application for a permit filed with the Corporation Commissioner.

Exhibit 71, dated June 3, 1929, addressed to E. P. Lyons, is in part as follows:

"With reference to the commissions of stock and cash which have been paid either by the company direct or Fred Shingle, the Syndicate Manager, the following list will show how these should be charged . . .

R. E. Toomey for the Producers, Modoc and Main State properties, $5000 cash, 30,000 shares of common, 27,000 shares of preferred.

L. R. Lourie for the Pelham properties 10,000 units of stock.

Frederic Vincent & Company for the Coalinga Empire and Cat-Canyon leases, 50,000 units of stock.

A. G. Wilkes,
Vice President."

32. The Court erred in overruling the objections to the admission in evidence of Exhibits 86-A, B, C and D, purporting to be books of account of the McKeon Drilling Company, Inc. used as the basis for the testimony of the Government Accountant G. S. Goshorn:

The witness, David C. Taylor, identified the said exhibits as follows:

I was employed as a bookkeeper by the McKeon Drilling Co. Inc. from February 1928 to June 4, 1931. These four books of McKeon Drilling Co. Inc. kept in the usual course of business for the purpose of reflecting the financial transactions of that company. The four books identified by the witness were offered in evidence and were

objected to as incompetent, irrelevant and immaterial, no proper foundation has been laid, in that it has not been shown that any of the defendants other than the McKeons were ever members of the corporation interested in the corporation known as the McKeon Drilling Co.; were hearsay; the defendants other than the McKeons could not be bound by any entries made in the books of that corporation, and the said books could not be received as evidence against any defendant other than those who made the record that is offered.

On behalf of the defendants McKeon there was no objection to the books in so far as they constitute the records of the financial transaction, but as to any and all parts of such books which purport to give recitals of facts and statements of conclusions, each of the defendants McKeon objected upon the ground that the books are not competent to make proof of any recitals of fact, but only prove the accounting condition of the concern of which they purport to be the financial records, and in this behalf the defendants McKeon ask that as various parts of said books may be referred to by the Government, specifically called attention to, that the objection as to the impropriety of such parts of said books may be permitted to be interposed. To this latter suggestion the Court agreed, but overruled the objection and exception was noted, and the books were received in evidence and marked as follows:

Exhibit 86-A "General Ledger of McKeon Oil Company.

Exhibit 86-B "Journal Transfer Book McKeon Drilling Co. Inc.

Exhibit 86-C "Large Loose Leaf Binder McKeon Drilling Co. Inc.

Exhibit 86-D "Large Loose Leafe Binder, Record of Checks Drawn, etc.

33. The Court erred in admitting in evidence Exhibits 87-A and 87-B over the following objection of defendants made in connection with the testimony of David C. Taylor:

I met the defendant Lyons in the McKeon Drilling Co. Inc's offices in the latter part of 1928. He came in to supervise the accounting work in connection with the Italo deal and prepared most of the entries in connection therewith. Lyons prepared certain journal entries which I transcribed in the McKeon Drilling Company's books, which are now in evidence. Lyons wrote certain pages of this document and I wrote the rest under his supervision. I do not know who asked Lyons to come in there. I believe Robert McKeon was there when Lyons was working on the books. I do not believe I saw them talking together. I do not believe that John McKeon or Raleigh McKeon were there when Lyons was working on the books. The work was done in the McKeon Drilling Co. Inc. offices in Los Angeles. Lyons was there about three weeks. The office was in charge of the McKeon Company.

The documents identified by the witness were offered in evidence and were objected to as incompetent, irrelevant, and immaterial, not binding upon any one except the officials of the McKeon Oil Company, and not upon the individual members of that concern; upon the further ground that it contained recitals and statements of fact in nowise binding upon any of the defendants in the action, and for which there has been no foundation laid, and which are not competent to be *prove* by entries of a person in any capacity in books of account or records of a business concern. They are hearsay and there has been no proper foundation laid. Upon the further ground that they are outside of the issues of the case and constitute a fatal variance between the allegations of the indictment and their purported effect as recitals of fact, in that the indictment charges the issue of 4,500,000 shares of the capital stock by the Italo Petroleum Corporation to the McKeon Drilling Company, and the evidence shows that the Commissioner of Corporations by his findings of fact and conclusions of law did not authorize the issuance of any stock by the Italo Petroleum Corporation of America to the McKeon Drilling Company.

Objection overruled. Exception.

The said exhibits were used as the basis for the testimony of the witness G. S. Goshorn, and purported to show the book value of the McKeon Drilling Co. Inc.'s assets; they recite that McKeon Drilling Co. Inc. only received 2,000,000 shares of stock and paid 2,500,000 shares thereof as commissions on the transactions whereby it sold its assets to the Italo Petroleum Corportion of America. The originals of said exhibits are before the Appellate Court.

34. The court erred in admitting in evidence Exhibit 89 under the same objection interposed to its admission as was interposed to the admission in evidence of 87-a and 87-b set forth in the assignment of error No. 31, which said document purported to recite the consideration received by the McKeon Drilling Co. Inc. from the Italo Petroleum Corporation of America on the sale of the McKeon Drilling Co. Inc. assets to Italo Petroleum Corporation of America.

35. The court erred in overruling the objections of defendants to the admission in evidence of Exhibit 94 which purported to be the Minute Book of the McKeon Drilling Co. Inc. as follows:

"This is a minute book of McKeon Drilling Co. Inc. kept by me and is a summarization of the occurrences that took place in the meetings that are purported to be set out in the minutes.

Government counsel offered the minute book in evidence, and it was objected to on behalf of those defendants who were not officers or directors of the McKeon Drilling Company and did not attend any of the meetings of the Board of Directors upon the grounds that it was incompetent, irrelevant, and immaterial; hearsay as to those defendants and not binding upon them. As to the McKeons the book was objected to as irrelevant, and immaterial to any issue involved in the case.

Objection overruled. Exception. The Minute Book was marked Government's Exhibit 94, and in substance purported to contain minutes of the meetings of the Board of Directors of the McKeon Drilling Co. Inc., certain por-

tions of which were read by the Government's counsel to the jury, and were in substance as follows:

"Minutes of the Board of Directors of the McKeon Drilling Co. Inc., held July 5, 1928, reciting the presence at the meeting of the following directors: John McKeon, R. S. McKeon, R. B. McKeon, E. B. Thackaberry, and M. G. Burrows, called for the consideration of the proposal made by Italo Petroleum Corporation of America to purchase certain assets of the McKeon Drilling Co. Inc. in accordance with the agreement that had been drawn up, contained the following unanimous resolution:

"WHEREAS, Italo Petroleum Corporation of America is desirous of purchasing from this corporation its oil and gas leases and the tools, machinery, equipment, pipelines and other personal property appurtenant thereto, together with the drilling equipment of this corporation, all as more fully listed in the proposed contract hereinafter referred to; and

WHEREAS, there has been submitted to this Board of Directors a proposed contract between this company, as seller, and Italo Petroleum Corporation of America, as buyer, which contract provides that the property described therein shall be sold for a total consideration of ~~five~~ Six Million ($6,000,000.00) Dollars, payable at the times and in the manner more fully set out in said contract; and

WHEREAS, the proposed contract was read at this meeting and was fully discussed and all of the Directors are fully conversant with the terms thereof;

NOW, THEREFORE, BE IT RESOLVED:

That it is the opinion of the Board of Directors of McKeon Drilling Co. Inc., that it is for the best interests of this corporation to sell, transfer and assign to said Italo Petroleum Corporation of America all of the real and personal property described in said contract, for the consideration and upon the terms therein expressed;"

36. The court erred in denying the following motion interposed by defendants to limit the evidence admitted by the court and not to consider as against certain defendants matters concerning which they were not charged in the indictment or bill of particulars as follows:

Thereupon defense counsel moved the Court to instruct the jury that they were not to consider any testimony pertaining to the execution of the McKeon contract, Exhibit 44, as supplemented by Exhibit 85, or any testimony of the witness Taylor or any other testimony pertaining to any alleged secret arrangement or agreement by which some of the defendants were to receive back 2,500,000 shares of the Italo Petroleum Corporation of America stock issued as part of the purchase price of the McKeon Drilling Company assets as against any of the defendants other than those named in the Bill of Particulars as having engaged therein. And that as to those defendants who are named in the Bill of Particulars as having participated therein such testimony could only be considered as against them on a showing that they were at that time parties to the alleged scheme and knowingly participated therein; upon the grounds and for the reason that the indictment, page 6, line 23 to page 7, line 4, as restricted

by the Bill of Particulars, page 5, paragraph 2, and the indictment page 7, line 5 to 17 as restricted by the Bill of Particulars, page 5, paragraph 4, and page 6, paragraph O-1 and page 6, paragraph O-2 and the indictment page 7, line 18, as restricted by the Bill of Particulars page 6 paragraph O-3, and the indictment page 7 line 26, as restricted by the Bill of Particulars page 5, paragraph L-5, and the indictment page 7, line 32, as restricted by the Bill of Particulars, page 6, paragraph O-4, restricted the proof of the Government to proving that only eight defendants, towit: E. Byron Siens, Maurice C. Myers, Paul Masoni, John Perata, James V. Westbrook, Alfred G. Wilkes, John DeMaria and Robert S. McKeon had knowledge of and participated in the transactions for the sale of the McKeon assets; had knowledge of and participated in any secret arrangement or agreement for the distribution of 2,500,000 shares of the capital stock of the Italo Petroleum Corporation of America received by the McKeon Drilling Company from the Italo Petroleum Corpporation of America as part of the purchase price of the said assets.

Defense counsel further stated to the Court that those defendants who were not named in the Bill of Particulars as having participated in those alleged acts never thought that they would be called upon to meet any charge that they did participate in said transaction.

The motion was denied and an exception noted.

37. .The court erred in overruling objections of defendants to the admission in evidence of Exhibits 183 to 228 inclusive, which said exhibits purported to be the books of account and records of Shingle, Brown & Com-

pany, a corporation, Shingle, Brown & Company, a co-partnership, Montgomery Investment Company, and other books of account of Shingle, Brown & Company, and of Fred Shingle, Syndicate Manager, and in refusing to limit the consideration of said books of account and the entries therein, and the contents thereof to such defendants as the evidence may have shown had knowledge of and authorized the making of said entries, and in refusing to instruct the jury not to consider the said evidence as to any other defendant or defendants and which said books of account and records were used as the basis of the testimony of the Government's witness G. S. Goshorn, said objection interposed to said exhibits being as follows:

Counsel thereupon offered the documents identified by the witness in evidence, and defendants objected as irrelevant, immaterial, not binding upon any of the defendants, hearsay as to all of the defendants, no proper foundation laid and as to any and all matters contained in the offered documents with respect to any transaction which is violative of the bill of particulars on which the defendants are relying.

Objection overruled. Exception.

38. The court erred in overruling the objection of defendants to the admission in evidence of the exhibits numbered 32-A, 32-B, 147 and 239 which purported to be the books of account and records of the Brownmoor Oil Company, a corporation, and in refusing to limit the consideration of said books of account and the entries therein and the contents thereof to such defendants as the evidence may have shown had knowledge of and authorized the making of such entries, and in refusing to

instruct the jury not to consider the said evidence as to any other defendant or defendants and in denying the defendants' motion to strike said exhibits from evidence and to instruct the jury to disregard the same, as follows:

Exhibit 32-B for identification is the general record book of Brownmoor Oil Company. Exhibit 32-A for identification is the general ledger of the Brownmoor Oil Company. I made entries in these two books during the time I was employed as bookkeeper by the Brownmoor Oil Company and they *wer* kept in the regular course of business to reflect the financial transactions of the Brownmoor Oil Company. Government counsel offered Exhibits 32-A and 32-B in evidence, and they were objected to as incompetent, *I*rrelevant and immaterial, no proper foundation laid, that it was not testified the books were kept regularly, and the witness has no personal knowledge of any of the contents, and is hearsay evidence. Objection overruled. Exception. Received in evidence and marked Government's Exhibits 32-A and 32-B respectively, and the entries therein contained were used as a basis for the testimony of the Government accountant, C. S. Goshorn.

39. The court erred in overruling objections of defendants to admission in evidence of Exhibits numbered 245-A, 245-B, 245-C which purported to be the books and records of John McKeon, Inc., a corporation, over the following proceedings had at that time:

It was stipulated between Government counsel and counsel for defendant John McKeon that the books produced by Government counsel were the books of John McKeon, Incorporated, a corporation, kept in the regular

course of business by that corporation. The books were offered in evidence and were objected to as incompetent, irrelevant and immaterial and hearsay as to defendants other than the defendant John McKeon, and were objected to by the defendant McKeon as incompetent to prove any fact or recital shown therein in this action between the Government and the said defendant McKeon. Objection overruled. Exception. The books of account were received in evidence and marked Exhibit *24*-A, B and C. Exhibit 245-A is labeled ledger of John McKeon, Inc.; Exhibit 245-B is labeled journal of John McKeon, Inc.; Exhibit 245-C is labeled minute book of John McKeon, Inc.; and were financial records of John McKeon, Inc., used by the Government accountant Gorshorn in his testimony.

40. The court erred in overruling defendants objection to the admission in evidence of Exhibit 268 for identification which is the letter pleaded in count two of the indictment, which said exhibit was offered in evidence during the testimony of witness, Grace Dennison Keating, at which time the following proceedings were had:

"I received Exhibit 268 for identification through the United States mails in the envelope attached thereto on or about the date it bears, at 256 Thorne Street, Los Angeles, California, from the post office establishment of the United States.

Government counsel offered Exhibit 268 for identification in evidence in support of count 2 of the indictment. Defendants objected to its admission as being at a time long subsequent to the completion of any scheme to defraud or any alleged conspiracy of the defendants,

and as hearsay as to the defendants Shingle and Brown, and to its consideration as evidence with respect to any defendant except those shown to be directly involved in it, and upon the further ground that it does not appear from the face of the letter itself that it could be or was mailed in furtherance of the scheme pleaded in the indictment.

Objection overruled. Exception.

The letter was received in evidence and marked Government Exhibit 268, and is as follows:

ITALO PETROLEUM CORPORATION

"Refineries" OF AMERICA Producers
Long Beach, Cal. Refiners
Marketers

March 8, 1929. Exporters

"TO THE STOCKHOLDERS OF THE ITALO PETROLEUM CORPORATION OF AMERICA:

The early part of 1929 finds the Italo Petroleum Corporation of America in the midst of a development campaign calculated to make the year one of the most successful ever experienced by any company. Our past year's growth was phenomenal. With this you will all agree.

The drilling program now under way in the most prolific of California's oil fields, will be the means of increasing our production considerably and naturally enhance the value of your investments in our Company.

The oil industry, as a whole, has had many discouraging elements to contend with in the past year. In the face of these conditions, your Company has forged ahead steadily. As a rule, it takes many years for a company to reach the stage of development that the Italo Petroleum Corporation of America is now in. This, you must admit, had been due to the capable and efficient management of your Officers and Directors, coupled with the loyal support of our stockholders.

Never in the history of our country have conditions been more ideal for the accumulation of wealth through the investment in sound, substantial securities. It is my opinion that you are now, through your investment in ITALO, on the right road to reap the harvest of your good judgment in acquiring ITALO stock when you did.

ITALO PETROLEUM CORPORATION OF AMERICA HAS NO STOCK FOR SALE TO YOU OR TO THE PUBLIC. As a stockholder, you are entitled to be advised as to the condition of your Company. Our earnings for the past year have, indeed, been satisfactory. Many big and important things have been planned for our Company. These plans should all be consummated shortly. In my judgment, the intrinsic value of your stock, through these new developments, will be greatly enhanced, and, no doubt, the stock market will react to the new program.

It is my opinion that Italo Petroleum Corporation stock is selling on the market below its real worth. I believe every investor taking advantage of the low price of ITALO stock, by acquiring additional shares at the present market, will realize a handsome profit very shortly.

While I am not in a position to disclose the contemplated activity that will take place, an announcement of the utmost importance will reach you in the very near future.

With many thanks for the loyal support you have given our Company as a stockholder, I am

Sincerely,

(SEAL) PAUL MASONI, Secretary"
PM:EM

The reverse side of this letter is written in Italian.

41. The court erred in receiving in evidence over the objection of the defendants Exhibit 47 for identification document alleged in the eighth count of the indictment alleged to have been mailed in furtherance of the scheme to defraud, which said document was received in evidence during the testimony of the witness, Lavina Hill Hopkins, at which time the following proceedings were had:

I received Exhibit 47 for identification through the United States mail on or about the date it bears, in the envelope attached thereto, at the address 128 North Sierra Bonita Avenue, Pasadena, California, through the post office establishment of the United States.

Government counsel offered Exhibit 47 for identification in evidence, and it was objected to on the same grounds and for the same reasons as were interposed to the admission in evidence of Exhibit 268, and on the additional ground that it appeared from the testimony of the witness that she did not acquire her stock in pursuance of any scheme to defraud alleged in the indictment, and

it affirmatively appeared from the evidence that the letter itself could not be and was not either from its face or from the other testimony of the witness or other evidence in the case mailed in furtherance of or for the purpose of executing any scheme to defraud.

Objection overruled. Exception.

The document was received in evidence, marked Exhibit 47, and is a lengthy pamphlet written partly in Italian and partly in English purporting to be a report of the Board of Directors of the Italo Petroleum Corporation of America, the original of which will be transmitted to the Circuit Court of Appeals.

42. The court erred in overruling defendants objections to the admission in evidence of Exhibit 269 for identification, being the letter alleged in the sixth count of the indictment to have been mailed in furtherance of the scheme or artifice to defraud, at which time the following proceedings were had:

I received Exhibit 269 for identification through the United States mails, in the envelope attached thereto. That is in my mother's name, and it came to her first.

Q. It came to both you and your mother?

A. No, it came to my mother and then through my mother's estate it came to me.

Q. I see. I notice the envelope is addressed "Mary E. Hill and Lavina Hill Hopkins."

A. It was sent to both of us.

Q. And was that delivered at the post office address, 128 North Sierra Bonita Avenue, Pasadena?

A. Yes sir.

Q. Through the post office establishment of the United States?

A. Yes, sir.

Government counsel offered Exhibit 269 for identification in evidence in support of count 6 of the indictment. Defendants objected to the admission in evidence of Exhibit 269 for identification on the same grounds and for the same reasons interposed to Exhibits 268, 46, 47 and 75.

Objection overruled. Exception. The letter was received in evidence in support of count 6 of the indictment and was marked Exhibit 269, and is identical with Exhibit 268, except that it is addressed to Mary E. Hill and Lavina Hill Hopkins, 128 North Sierra Bonita Avenue, Pasadena, California.

43. The court erred in admitting Exhibit 239 in evidence over the following objections of defendants:

Thereupon Government counsel stated that he desired to read from the Brownmoor Oil Company minute book, Exhibit 239 for identification, and offered the book in evidence, which was objected to by the defendants as incompetent, irrelevant, immaterial, no proper foundation laid, it had not been shown that the contents thereof had been brought to the personal attention of any of the defendants in the case, wholly outside of the issues of the case, hearsay, and not binding upon any person whose name does not appear to have participated in the transaction set forth in the minute book.

Objection overruled. Exception. The minute book was received in evidence and marked Exhibit 239 in evidence. Counsel thereupon read certain minutes.

Thereupon defense counsel moved to strike out of evidence each and every one of the minutes read by the District Attorney upon the grounds that it was res inter alios acta, and on the further ground the portion of the minutes referring to the sale of certain assets of the Brownmoor Oil Company to E. M. Brown is not within the issues of the case, and upon the further ground that they were incompetent and hearsay as to all defendants not shown to be present at the meetings of the board of directors. Defendants moved the court to instruct the jury not to consider any portion of the minutes in the minute book of the Brownmoor Oil Company as against any defendant not shown to be present at those meetings and not signed by such defendant.

Motion denied. Exception.

44. The court erred in overruling defendants objections to and in refusing to limit the testimony of the witness Charles B. Behr, as to certain conversations testified by him as having been had with the defendant Alfred G. Wilkes in which the defendant Wilkes stated that certain stock would have to be paid as promotion stock and that he, Wilkes, would pay Joe Weinblatt $25,000 to assist securing the issuance of a permit by the Corporation Commissioner, all of which was over the exceptions of the defendants at the time, and the objection that it was incompetent, irrelevant, immaterial, and hearsay as to defendants who were not present and participating in said conversation.

45. The court erred in overruling defendants objection to the admission in evidence of Exhibits 283 and 284 which purported to be certified copies of the income tax

returns of the Brownmoor Oil Company and Italo American Petroleum Corporation for the year 1927, which said Exhibits disclosed losses incurred by said corporations of said year. Said objection to said Exhibits being as follows:

The defendants objected to its admission in evidence as incompetent, irrelevant, and immaterial, not the best evidence, not binding upon any of those not connected with the particular corporation, and on the further ground that the income tax return of all parties are expressly privileged and cannot be produced or divulged in court.

Objection overruled. Exception.

46. The court erred in overruling defendants objection to the admission in evidence of Exhibit 234, the indictment letter pleaded in the twelfth count of the indictment, said objection being as follows:

After writing the letter of December 28, 1928, I received this letter through the United States mails on or about the date it bears, at my office, 727 West 7th Street, Los Angeles, California, through the postoffice establishment of the United States. This letter is marked Government's Exhibit 234 for identification, and was offered in evidence in support of count 12 of the indictment. It was objected to as incompetent, irrelevant, and immaterial, not within the issues of the case, there being no showing as yet of any transaction with reference to the syndicate which would in any way constitute part of any scheme or artifice to defraud.

Objection overruled. Exception.

The letter was received in evidence, and is on the letterhead of Shingle, Brown & Company, dated January 23, 1929, addressed to O. J. Rohde, 727 West 7th Street, Los Angeles, California, and reads as follows:

"Dear Mr. Rohde:

In reference to your participation in the ITALO syndicate, it is impossible at this time to state definitely when you can be paid out in full, but I am liquidating as far as the market will warrant, and am in hopes that everything can be accomplished before many more months pass.

As regards profit in the deal, this also is hard to estimade until further liquidation is accomplished.

As soon as anything transpires of interest to participants I will immediately advise you.

Very truly yours,

Fred Shingle,
Syndicate Manager".

47. The court erred in overruling defendants objections to the admission in evidence of Exhibit 297 and to the testimony of the witness G. S. Goshorn with respect thereto as follows:

I have examined the books and records in evidence and the books and records of Wilkes and Cavanaugh, partners, that I have just described, for the purpose of ascertaining the disposition of the 4,500,000 shares of stock issued by the Italo Petroleum Corporation of America for the assets of the McKeon Drilling Co., Inc., and of ascertaining the amount of money and stock realized by the defendants from that 4,500,000 shares of stock. From the

examination I have ascertained and have prepared a summary reflecting the disposition of the stock, based on the records and books in evidence and the books and records of Wilkes-Cavanaugh partnership, and also reflecting the money and stock realized by the defendants from the 4,500,000 shares of stock of the Italo Petroleum Corporation of America issued for the assets of the McKeon Drilling Company, Inc. These are the two summaries that I prepared in accordance with my testimony.

MR. REDWINE: I offer the two summaries in evidence.

47-a Defendants objected on the following grounds to the introduction of the two summaries: They are incompetent, irrelevant and immaterial, the proper foundation has not been laid, they call for a conclusion of this witness, the books and records from which the summaries are made are not in evidence, the testimony is entirely hearsay and prejudicial, tending to prove no issue in the case, and it would be impossible to cross-examine the witness upon the conclusions as to which he has arrived without having the Wilkes-Cavanaugh books from which such cross-examination could be directed.

Whereupon the following proceedings were had:

MR. SIMPSON: I would like to ascertain the purpose of the offered exhibit, your Honor, from the District Attorney.

MR. REDWINE: It is to show the disposition of this 4,500,000 shares of stock.

THE COURT: Where the stock went?

MR. REDWINE: Yes, your Honor, as reflected by the books and records in evidence, and also to show

the amounts of money and stock that each of the individual defendants realized from this 4,500,000 shares of stock.

MR. SIMPSON: That being the purpose of the offered exhibit, we object to the offered exhibit and to any testimony of the witness now on the stand pertaining to any matters that may be narrated as to the offered exhibit, upon the grounds they are incompetent, irrelevant and immaterial; they are hearsay, and that the offer made by the District Attorney is too broad in scope, in this: that by his offer he is offering the exhibits and the testimony of the witness as against all the defendants, whereas the bill of particulars furnished by the Government in this case specifically restricted the testimony to the allegations of the indictment with respect to the matters referred to by the District Attorney to eight named defendants, entirely omitting from the bill of particulars any reference to any of the other ten defendants, nine of whom are now on trial, and if it is the purpose of the District Attorney by reason of the offer that he is now making in evidence to repudiate and violate the terms of the bill of particulars furnished to these defendants under the order of court, we now state to this court that we are entirely taken by surprise by the offered evidence of the District Attorney, which is in violation of that bill of particulars to make any reference to any of the other ten defendants, nine of whom are now on trial, and if it is the purpose of the District Attorney by reason of the offer that he is now making in evidence to repudiate and violate the terms of the bill of particulars furnished to these defendants under the order of court, we now state to this court that we are entirely taken

by surprise by the offered evidence of the District Attorney, which is in violation of that bill of particulars which we have relied upon. Now, it may be true as a matter of law that the proper way of presenting this matter is not by objection. I am not certain as to that, but I am making my objection, and in connection with that objection I am now moving the court that if this testimony is admitted by the court it be admitted for the limited purpose as specified in the bill of particulars, and that it is not to be considered for any purpose as against any of the ten defendants who are not named in the bill of particulars, and by reason of not being named therein are expressly excluded therefrom, of having participated in any of the transactions narrated in the exhibit offered, or from having ratified or participated or shared in any of the matters therein referred to. The law is quite plain that when the Government under order of the court is required to furnish a bill of particulars, they are restricted to the matters set out in the bill of particulars as to the defendants therein named. By reason of that principle of law and that restriction, we are making our motion at this time.

WHEREUPON Government counsel, in response to a question from defense counsel stated that by the summary he intended to show the disposition of the stock of the McKeon Drilling Company, Inc., and also to show this money and stock realized by each of the others who realized any money or stock from the transaction, and that the summary refers to all defendants on trial.

THE COURT: The objection is overruled.

MR. SIMPSON: An exception.

MR. ABRAHAMS: I objected, your Honor, to the introduction of those summaries, because, according to the witness, they have been prepared from books which are not in evidence, partially, at least, books that are not books of some of the defendants, and books that would not bind any of the defendants excepting the partners whose books they were, and therefore as to all of the defendants except perhaps the two defendants whose books were examined, this evidence would be hearsay and would be directed to a writing which is not in evidence, and it would deprive the defendants of their right to cross-examination.

THE COURT: Well, the books are, according to the evidence, in the possession of the defendants themselves. That deprives you then of the ground of the objection. The objection is overruled.

MR. ABRAHAMS: Exception.

The two summaries were received in evidence and marked Government's Exhibit 297, whereupon a chart approximately five feet wide and ten feet high was placed upon standards in the courtroom in the view of the jury.

The ruling of the court on the motion of the defendants, after they had an opportunity to see the offered exhibit, was withdrawn and the following additional objection interposed thereto:

MR. DIVET: I object to the introduction of the exhibit on the ground that no proper foundation has been laid in this: Many books and records have been introduced in evidence and are in evidence confessedly immaterial and irrelevant to any issue, and so expressed by the

States' Attorney when he was putting them in, he stating in that regard that they were only offered because they contained matters to which the accountant would refer; that the testimony of the witness now shows that the summary has been made from books and records in evidence without pointing out or indicating the parts of such books and records from which the summary is made, and it therefore does not appear whether it is based upon relevant and material or irrelevant and immaterial evidence, and the effect of the introduction of the summary is to lay before the jury the conclusions of the witness as to what was shown by the books without specification or designation of what books and parts of the records it is based upon, and therefore there is no disclosure as to whether it is upon proper or improper items of evidence. We object further upon the ground that the exhibits profess to set forth the conclusions both of law and of fact of the witness making the summarization or stating the matters contained upon such exhibits, and that no proper or sufficient foundation is laid to make any such conclusions of either law or fact proper or binding upon any of the parties to this action.

THE COURT: The objection is overruled and the exhibit is admitted.

MR. SIMPSON: Exception.

MR. REDWINE: Q. Now, Mr. Goshorn, using the summary for the purpose of illustration, will you state what the disposition of the 4,500,000 shares of the capital stock of the Italo Petroleum Corporation of America that was provided to be paid to the McKeon Drilling Company in the contract was?

47-b. MR. DIVET: That is objected to as calling for a conclusion of the witness on the construction of the exhibit, and upon all of the grounds urged in the last objection. May it now be understood that the objection may stand to all similar questions concerning the exhibit?

THE COURT: Yes. Answer the question.

MR. DIVET: Exception.

A. This summary shows the disposition of the 3,500,000 shares of common stock and the 1,000,000 shares of preferred stock of the Italo Petroleum Corporation of America as shown by the books and records, which were issued in acquiring the properties of the McKeon Drilling Company, Inc. The first summary relates to the common stock. Line No. 1 is retained by the McKeon Drilling Company, Inc., 2,000,000 shares of common. Line No. 2 refers to reacquired common stock which was reacquired from the McKeon Drilling Company escrow with Shingle, Brown & Company, 15,711½ shares, making a total of 2,015,711½ shares which was distributed as follows: Line 4 shows 25,000 shares of common going to a Mr. Stewart for commission. Line 5 is 135,000 shares of common which was given to Mr. J. B. DeMaria as per the resolution in the minute books of the McKeon Drilling Company, as the purchase price adjustment, he having previously purchased some stock, and the market value having gone down, and in order to compensate Mr. DeMaria this additional stock was issued to him.

On motion of the defendants the court ordered stricken that portion of the witness' answer stating that the 135,000 shares of common stock was given to Mr. J. B. DeMaria.

VOIR DIRE EXAMINATION

Q. Mr. Goshorn, I notice on this chart, which is Exhibit 297, that in many places you have characterized certain stock as "bonus stock". Is there any place in the books and records that you have examined that are in evidence where the words "bonus stock" are used to characterize any of the transactions referred to therein, or is that your own characterization?

A. That is my own designation. The books of the McKeon Drilling Company say that some 2,500,000 shares were given for commissions.

MR. SIMPSON: I think that the answer of the witness again indicates the fact that he is now testifying and that the exhibit refers to matters which are his own conclusions.

THE COURT: Yes. You should not designate it bonus stock. I think that is clear. Mr. Goshorn, you are proposing by this exhibit to show where the 4,500,000 shares went?

A. That is correct.

Q. Was 4,500,000 shares actually issued by the Italo Petroleum Corporation of America?

A. Yes.

Q. That is shown by the issue of certificates in the regular way, of course?

A. I may qualify that, your Honor, in saying that the certificates that were issued directly to the McKeon Drilling Company did not total exactly 4,500,000. There are 60,500 units which were delivered by the trustee on the order of McKeon Drilling Company for the International Securities Company, and that amount was de-

ducted before the certificates were issued to the McKeon Drilling Company,

Q. Well, in your summary, then, and your summary is the result of your examination of these stock books?

A. The stock books are part of them, yes sir.

Q. Yes, a part. And when you say, for instance, that $25,000 or 25,000 shares were issued, the stock books show the issue of 25,000 shares. You designate it as—what is that? Stewart?

A. No, your Honor, the stock certificate books of Italo do not show that. The books of McKeon show that 25,000 shares were delivered to Mr. Stewart as commission.

THE COURT: Mr. Redwine, I suggest that the witness remark the designations such as bonus stock.

MR. REDWINE: I am willing to have the "bonus" changed to "commission" stock as it is designated on the books of the McKeon Drilling Company.

MR. DIVET: It should not be changed to anything.

THE COURT: Yes, that may be done. Proceed with your examination.

MR. REDWINE: We will have that stricken, have the word "commission" substituted for "bonus".

MR. DIVET: I think it is just as objectionable as bonus.

THE COURT: Well, he says the books themselves show or use that term. Is that correct?

A. That is correct.

Q. So of course that would be all right. Proceed with your examination, Mr. Redwine.

DIRECT EXAMINATION

resumed.

BY MR. REDWINE:

Q. Will you continue, Mr. Goshorn, with your statement of the disposition of that stock?

A. Line 6 shows McKeon Drilling Company, Incorporated, 186,096 shares of common. Line No. 7, A. G. Wilkes, 400,000 shares of common. Line No. 8, DeMaria purchase, 125,000 shares of common. Line No. 9 is the Seaton Community lease adjustment, 100,506 shares. Line No. 10 is for the Dabney Oil Company, 1,000,000 shares. Line No. 11—this will be stricken, it will be combined with the other stock, some 44,109½ shares. The sum total of these equaling the 2,015,711½ shares that were retained by the McKeon Drilling Company. These 44,109; shares is composed of the following items: Line No. 12, Mikel No. 2 account for John McKeon, 15,666 shares. Line No. 13 is the Bank of Italy escrow covering Vincent & Company's sales, 15,732-3/4 shares. Line No. 14, the stock exchanged for syndicate stock, 11,704-3/4 shares. Three items totaling 44,109½ shares of common.

Line No. 16 is the common stock which was distributed by the McKeon Drilling Company, Inc., totaling 1,484,-288½ shares, which were distributed as follows: Line No. 17 is the escrow stock substituted for syndicate stock, 35,114-1/4 shares. Line No. 18 is the Bank of Italy escrow covering Vincent & Company partial payment sales of 47,216-1/4 shares. Line 19 is the Mikel No. 2 account, For Shingle, Brown & Company and A. G. Wilkes, of 33,334 shares. Line No. 19 relates back to Line No. 12, Mikel No. 2 account. It was all sold through that account. That account was carried in the books and

records of Shingle, Brown & Company. Line No. 20 is the Mikel No. 1 account, Shingle, Brown & Company, 161,392. Line No. 2, the Jones No. 1 account, Shingle, Brown & Company, 279,245 shares. Line No. 22, the stock sold in the name of Egon Tropp for the account of Wilkes, Cavanaugh, Myers and John McKeon, 100,000 shares. Line No. 23, is 31,250 shares of stock to Mr. F. V. Gordon for the account of A. G. Wilkes. Line No. 24 is 100,533 shares to William Cavanaugh for the account of Mr. A. G. Wilkes. Line No. 25 is International Securities Company of 60,500 shares. Line No. 26, A. G. Wilkes, 25,000 shares. Line No. 27, William Cavanaugh, 10,000 shares. Line No. 28, Paul Masoni, 62,500 shares. Line No. 29 is E. Byron Siens, 37,057 shares. Line No. 30 is Maurice C. Myers 62,500 shares. Line No. 31, James V. Westbrook, 25,000 shares. Line No. 32, John M. Perata, 62,500 shares. Line No. 33, A. F. Jones, reserve account, Shingle, Brown & Company, 23,716 shares. Line No. 34 is the Shingle, Brown & Company for 2,431 shares. Line No. 35, E. Byron Siens, Farmers & Merchants Bank loan, 200,000 shares. Line No. 36, the Bank of Italy escrow to cover Vincent & Company market losses, 125,000 shares. The sum total of lines 17 to 36, inclusive, equals 1,484,288½ shares, which agrees with line 16, making line 16, 1,484,288½ shares, combined with line 3 for 2,015,711½ shares, makes a total number of shares of common of 3,500,000.

Q. Now will you go to the preferred?

A. In the preferred, line No. 39 is the preferred stock distributed by McKeon Drilling Company, Inc., of 1,000,000 shares. Line No. 40, E. Byron Siens and the McKeon Driling Company, that is the DeMaria purchase, of 125,000 shares. Line No. 41 is William Cavanaugh

for the account of A. G. Wilkes, 2,070 shares. Line No. 42 is International Securities Company, 60,500 shares. Line No. 43 is the Bank of Italy escrow, Vincent & Company partial payment sales of 62,755 shares. Line No. 44 is the escrow stock substituted for syndicate stock, 6,819 shares. Line No. 45 is Jones No. 1 account, Shingle, Brown & Company of 2070 shares. Line No. 46 was sold in the name of Egon Tropp for the account of A. G. Wilkes, Cavanaugh, Myers and John McKeon, 305,180 shares. Line No. 47 was sold in the name of M. Taber for the account of A. G. Wilkes, Cavanaugh, Myers, John McKeon, 6000 shares. Line No. 48 is the Bank of Italy escrow to cover Vincent & Company market losses, 125,000 shares. Line No. 49, Paul Masoni, 62,500 shares. Line No. 50, E. Byron Siens, 32,106 shares. Line No. 51 is Maurice C. Myers, 62,500 shares. Line No. 52, John M. Perata, 62,500 shares. Line No. 53 is James V. Westbrook 25,000 shares. Lines Nos. 40 to 53, inclusive total 1,000,000 shares, which agrees with line No. 39.

And the 1,000,000 preferred plus the 2,500,000 shares of common equals the total number of shares of 4,500,000.

Q. Now, Mr. Goshorn, using the chart, I mean using the summarization for the purposes of illustration, will you state what the realization by the various defendants was from those 3,500,000 shares of common stock and 1,000,000 shares of preferred stock issued by the Italo Petroleum Corporation of America in accordance with the contract between that corporation and the McKeon Drilling Company, Inc.?

47-c. MR. DIVET: Objected to as calling for a pure conclusion of the witness as to realization.

THE COURT: Mr. Redwine, where do you get your figure in dollars and cents?

MR. REDWINE: The figures in dollars and cents, your Honor, are derived from the money that is delivered from these defendants from the books and records. The Wilkes-Cavanaugh record will show certain stock sold, certain money received, and certain money distributed. It is all based upon the books and records in evidence here.

THE COURT: And when you say realization, of course, that is what he means, I suppose, by realization?

MR. DIVET: Well, if the Court please, it seems to me it is a pure matter of conclusion as to whether or not anybody realized anything from the complicated separate transactions. That must be determined from the transactions.

THE COURT: I know, but for instance, based upon a check to a certain party and endorsed by him, that is a fair presumption, isn't it, that he realized that money?

MR. DIVET: No, I think that really carries with it a meaning beyond received.

THE COURT: Well, what you really mean is received, do you not?

MR. REDWINE: Well, received or realization.

THE COURT: I don't think there is any substantial basis there. All right. Objection overruled.

47-d. MR. SIMPSON: We renew our objection.

MR. DIVET: Exception.

MR. SIMPSON: With reference to the matters set forth in the bill of particulars again, your Honor.

THE COURT: Very well. Overruled.

MR. SIMPSON: Exception.

A. This is a summary of the realization from the disposition of the 3,500,000 shares of common stock and 1,000,000 shares of preferred stock of Italo Petroleum Corporation of America as per books and records which were issued in acquiring the properties of McKeon Drilling Company, Inc. Alfred G. Wilkes, cash, $186,088.24, stock of $1 par value, is common 156,783 shares, preferred 2,070 shares. William Cavanaugh, cash, $94,138.74. John M. Perata, common stock, 62,500 shares; preferred stock 62,500 shares. Paul Masoni, common stock, 62,500 shares; preferred stock, 62,500 shares. John McKeon, $251,520.56. McKeon Drilling Company, $46,699.85. The McKeon Drilling Company is shown as John McKeon, R. S. McKeon and Raleigh McKeon. James V. Westbrook, 25,000 shares of common stock and 25,000 shares of preferred stock. Maurice C. Myers, cash $6,000, common stock 62,500 shares, and preferred stock 62,500 shares. Shingle, Brown & Company, cash $578,-260.63, common stock 26,147 shares. The Shingle, Brown & Company are Axton F. Jones, Fred Shingle, Horace J. Brown and R. L. Mikel. E. Byron Siens, cash $238,277.45, common stock 87,057 shares, preferred stock 32,106 shares; making a total cash of $1,400,985.47; common stock 482,487 shares; preferred stock 246,676 shares.

Q. Now on those particular items, where you have cash, for instance, we will take Alfred G. Wilkes, cash, $186,088.24, common stock 176,783 shares, does that mean that he received the cash and also the stock?

A. Yes, the cash is separate from the stock consideration, the stock received.

Q. And that is the same with the rest of your summary?

A. Yes, that is true with all that.

48. The court erred in denying the following motion to strike out the names John McKeon, Robert McKeon and Raleigh McKeon appearing on Exhibit 297:

Q. And by this summary you don't want to convey the idea to the jury that the McKeon Drilling Company is composed of those three men and nobody else, do you?

A. No, I would not want to create that impression.

MR. ABRAHAMS: I am going to ask the Court at this time to strike from that summary the names John McKeon, R. S. McKeon and Raleigh McKeon. I think that is palpably just hearsay, and I think it is no part of the summary. The McKeon Drilling Company is a corporation, and it has been so shown in the evidence.

THE COURT: Any objection?

MR. REDWINE: There is an objection to striking those from the case, your Honor. The minute book of the McKeon Drilling Company, Inc., that is in evidence shows that John McKeon and Raleigh McKeon and R. S. McKeon are interested in that company. Therefore they would have participated in the profits of that company. The books and records—

THE COURT: But his point is that they are the sole, the parties solely interested in it.

MR. REDWINE: Well, those were the parties that were named in the minute books and the testimony of Mr. Thackaberry was that they were the sole stockholders.

THE COURT: My recollection is that the evidence somewhere of somebody is that they are the sole stockholders other than—

MR. REDWINE: Mr. Thackaberry testified that they were the sole stockholders, and that the other persons whose names appeared as stockholders were merely dummy or qualifying stockholders.

THE COURT: I am quite sure that there is such a thing in the record.

MR. ABRAHAMS: That may be the evidence, your Honor, and I am not asking to strike this out if it is, but this is a summary made by an auditor supposedly made from books and records, and I am asking to strike it from that summary.

THE COURT: Motion denied.

MR. ABRAHAMS: Exception.

49. The court erred in sustaining the plaintiff's objection to the following question asked by defense counsel of the witness, G. S. Goshorn on cross-examination respecting his testimony with respect to Exhibit 297, and in refusing to permit the defendants to introduce evidence or to cross-examine the witness Goshorn with respect to said Exhibit No. 297.

On cross-examination of the witness G. S. Goshorn with respect to Exhibit 297, he testified as follows:

The item of $578,260.63 which I have charged to Shingle, Brown & Company, shows on the books of Shingle, Brown & Company. Those books show that the $578,-260.63 was taken into the profit and loss account of Shingle, Brown & Company. I think the profit and loss account is here. It showed all of it as a profit.

The following proceedings were had on cross-examination of the said witness Goshorn by counsel for defendants Fred Shingle and Horace J. Brown, the rulings on which are hereby assigned as error:

With reference to the items appearing on Exhibit 297, and to the item there "Shingle, Brown & Company,

$578,260.63," I testified that that was net. I did not make any examination of the operating expense account of the books and records of Shingle, Brown & Company for the years 1928 and 1929 to find out the nature of their business and the amount of expense that that company bore for the operation of its business.

Q. Now, do you know from an examination of any of these books and records in evidence that during the year 1929 that the detailed earnings of Shingle-Brown were $1,229,692.09; that after deducting their expenses, operating expenses and other expenses, it left a net profit for that year of $397,840.29?

MR. REDWINE: Just a moment, I object to this line of cross-examination, your Honor, on the grounds, first, that the question has been asked and answered, and, second, it is not proper cross-examination. The witness has stated that he did not examine the books of Shingle, Brown & Company for any such purpose.

MR. SIMPSON: I understood from the testimony that the witness just gave that his idea was that the five hundred seventy-eight and some-odd thousand dollars was supposed to represent a net profit.

THE WITNESS: Net amount received.

THE COURT: One moment, please.

MR. SIMPSON: That is what I am trying to clarify.

THE COURT: Well, it is of no moment to anybody in this case—I was going to say in the courtroom, but of course that would not be true, what the net profit or financial condition of Shingle, Brown & Company was either that year or any other year. Certainly that would not be within any of the issues of the case, I would think.

MR. SIMPSON: I think the court is in error in that view of the testimony given by the witness.

THE COURT: The use of the word "net"?

MR. SIMPSON: Yes, your Honor, the impression I got from it—I may be wrong, but the impression I got is that by this exhibit they have up there before the jury that they are attempting to leave the impression that this five hundred seventy-eight and some odd thousand dollars was net profit, without taking into consideration the net operating expenses or other expenses to which this firm was subjected.

THE COURT: Well, that isn't the court's understanding. In the first place, I was going to interrupt to inquire at this point—my understanding, Mr. Goshorn, from your testimony was that Mr. Wilkes, for instance, received $186,088.24, and also received 156,783 shares of stock. Did I misunderstand you?

A. That is correct.

THE COURT: Well, which is correct.

A. You did not misunderstand me.

THE COURT: Well, I asked you that question, for at least that testimony was given yesterday, I believe, and that is the situation?

A. That is true.

THE COURT: In other words, he received out of the deal $186,088.24, and also received 156,783 shares of common stock and 2070 shares of preferred stock. Now, the same with Shingle, Brown & Company, that is the amount specified there. Obviously we are not concerned with what the net profit or gross profit of Shingle-Brown was or anybody else. My understanding of the witness's testimony is that out of this transaction there was paid to Shingle, Brown & Company 578,000 and so forth dollars. Now, whether they paid that all for rent or stenographic

hire or anything of that sort is certainly not any element in this case, so far as I see.

MR. SIMPSON: Well, your Honor, this witness has stated on the witness stand on numerous occasions that these matters referred to on this chart were obtained by the parties who obtained them, without any consideration. Now, I do not know whether he is using consideration in a legal sense or how he is using that term, whether he is using it as money, services, or what. I think in view of that, with the allegations in the indictment, we are certainly entitled to find out what the fact is.

THE COURT: Well, what we are investigating is whether or not Shingle-Brown or anybody else received money they shouldn't have received.

MR. SIMPSON: I do not understand it that way, your Honor.

THE COURT: What they did with it is a matter not of our concern at all.

MR. SIMPSON: Well, I am not going into the question of what was done with that particular money at all. My question is directed to the proposition that this item of 578 and some odd thousand dollars represented actual cash received.

THE COURT: When you say you are not concerned with the question of what they did with it, it seems to me you do directly concern yourself when you ask if it was a net profit in the conduct of their business.

MR. SIMPSON: No, your Honor.

THE COURT: Very well. So far as finding out what they actually received, of course you can follow that to the limit, but so far as its being a net profit to them, that wouldn't make any difference if they hired agents in the transaction and paid them money, providing that the

consideration originally went to them, I wouldn't think. Now, my understanding is that we are trying to find out how much money or stock Shingle, Brown & Company made out of this deal, that is to say—what was it; is this the Big Syndicate?

MR. REDWINE: That is the McKeon Drilling Company deal.

THE COURT: Yes, the McKeon Drilling Company deal. That is all. Now, it does not—obviously that does not involve net profit. That is ridiculous.

MR. SIMPSON: Well, what does it involve, your Honor?

THE COURT: It involves the amount of money that they made improperly if it—

MR. SIMPSON: I take exception to that, your Honor, that it was made improperly.

THE COURT: Well, wait a moment, Mr. Simpson. Do not be so impatient. If you had waited you would have allowed me to add to that, assuming that it was improperly made. I am not saying they made it improperly, of course, but that is the theory of the Government, and I am concerned in knowing how much they received from the deal. It may be a question for the jury to find out whether they made it improperly or not. So I think that the matter is clear; at least it was perfectly clear up to this time, as to what we are investigating.

MR. SIMPSON: Your Honor, it is my understanding that if you undertake to find out how much a person earns, or how much he gets or receives, that in order to ascertain that fact you have to ascertain also how much it costs him to get it.

THE COURT: Yes, that might very well be in a civil suit, but we are not concerned with that here.

MR. SIMPSON: We are not?

THE COURT: No, I do not think so. In other words, just what the capacity of Shingle, Brown & Company in this particular deal was—I do not have it in mind clearly, but the Government is trying to prove that Shingle-Brown obtained from that transaction $578,260.63 improperly, as I understand their position, and whether they were maintaing offices somewhere where their office expenses were high, because that I think is involved in your questioning, certainly that isn't any matter—it isn't any business of the Government to find out how much it cost them while they were going this. See if we understand each other.

MR. SIMPSON: I think we understand each other, your Honor, I think the question is perfectly proper. In addition to that, I take the further position, as I have consistently taken, that this matter is specifically restricted by the bill of particulars in this case, and that in making the remarks that the court made, the court commented on particular matters specifically excluded in the bill of particulars.

THE COURT: Well, you understand that I had no bill of particulars in mind in making the explanation, and they are not in this discussion. That is a matter to be taken up in another way, of course, by motion. Proceed with your examination.

MR. SIMPSON: Then am I to understand, so I won't go contrary to the court's ruling, that I am not permitted to question this witness with respect to any matters about any costs, expenses, valuations of services, or any other such thing which may go to constitute a proper charge or expense against this item of $578,260.63?

THE COURT: Well, now, that is my view, yes. Yes, that is my view of the matter. This matter came up rather incidentally, more in the way of my desire to be enlightened on some question in the testimony.

MR. SIMPSON: Yes, I think it came up in connection with the question I asked.

THE COURT: Well, the objection should be sustained to that question, if that is it.

MR. SIMPSON: That is the ruling of the Court? I do not want to go contrary to it.

THE COURT: Yes.

MR. SIMPSON: Well, we take an exception to the ruling of the Court.

50. The court erred in overruling defendants' objection to the admission in evidence of Exhibit 298 received during the testimony of the witness G. S. Goshorn, as follows:

I have examined the stock certificate book of the Brownmoor Oil Company, which is Exhibit 146, and compiled a schedule of the stockholders of that company as of the date of the sale of its assets to the Italo Petroleum Corporation of America, and have computed and included in this schedule the number of shares of Italo stock those Brownmoor stockholders were entitled to receive respectively, because of the sale of the Brownmoor assets to the Italo Petroleum Corporation of America. This is the schedule which I have prepared.

Government counsel offered the schedule in evidence. Defendants objected to it as incompetent, irrelevant and immaterial, calling for a conclusion of the witness, no proper foundation laid, hearsay, and not within the issues

of the indictment for the reason that the exhibit purports apparently to recite who were the stockholders of record of the Brownmoor Oil Company, which is not evidence of who the actual owners of the stock were or who was entitled to control that stock. The indictment alleges that the stock went to persons entitled thereo, and everyone knows that many times stock appears in the name of a person as a stockholder of record that does not actually belong to him. He may have sold it or otherwise disposed of it and without evidence that these persons here were the actual owners of the stock the offered exhibit is incompetent and of no probative value whatsoever.

Objection overruled. Exception.

The schedule prepared by the witness was received in evidence and marked Exhibit 298, and is in words and figures as follows:

Schedule prepared from stock certificate book of Brownmoor Oil Company showing stockholders of that company as of the date of the sale of its assets to the Italo Petroleum Corporation of America together with computation showing number of shares of Italo stock the Brownmoor stockholders were entitled to receive because of the sale of Brownmoor assets to the Italo Petroleum Corporation of America.

Certificate No	Stockholder	No. Shares	No. Shares Italo Stock Entitled to Receive	
			Common	Preferred
26	J. V. Westbrook	1	3/5	3/5
37	E. B. Siens	1	3/5	3/5
38	Howard Shores	1	3/5	3/5
43	Edna V. Cooper	184,694)		
57	" "	20,000)	120,416–2/5	120,416–2/5
45	C. M. Durham	2,000	1,200	1,200
54	Monrovia Oil Co.	125,000	75,000	75,000
55	" " " #2	125,000	75,000	75,000
58	A. L. Bentley	1	3/5	3/5
59	E. L. Cragin	1	3/5	3/5
60	E. Byron Siens, Trustee,	500,001	300,000 3/5	300,000 3/5
61	M. W. Yeager	1,500	900	900
Numerous	Alexander Grant	35,000	21,000	21,000
79	A. E. Mikelwait	1,000)		
80	" "	4,000)	3,000	3,000
81	Howard Shores	2,800	1,680	1,680
82	H. B. Brodster	3,000	1,800	1,800
		1,000,000	600,000	600,000

51. The court erred in overruling defendants' objection to the admission in evidence of Exhibit 299 which purported to be two summaries prepared by the witness, G. S. Goshorn, showing the disposition of the stock issued by the Italo Petroleum Corporation of America for the assets of the Brownmoor Oil Company, and the realization by defendants in stock and money from that disposition, the said objection and ruling being as follows:

Government counsel offered the summaries prepared by the witness in evidence. Defendants objected to its admission as incompetent, irrelevant, and immaterial, no foundation laid for it, and particularly objected to an expression appearing on the offered exhibit, the word "Bonus", because the document was to appear before the jury, and on the further ground that the proper foundation had not been laid by the witness' testimony as to the matters set forth on the exhibit, and the defendants would therefore be deprived of an opportunity to properly cross-examine him about it, because he had not given any testimony concerning the manner in which he prepared this or the source of his information.

Objection overruled. Exception.

The summary prepared by the witness, being on a chart approximately 10 feet high and 5 feet wide, was exhibited to the jury, and was marked Exhibit 299, and is in words and figures as follows:

Summary showing Disposition of 600,000 Shares of Common Stock and 600,000 shares of Preferred Stock of Italo Petroleum Corporation of America (per books and records) issued in acquiring the properties of the Brownmoor Oil Company.

		Common	Preferred
1.	Total Shares issued for properties of Brownmoor Oil Company	600,000	600,000

		No. Shares Common	No. Shares Preferred
2.	"Bonus" given to members of $80,000 Syndicate	40,000	40,000

		No. Shares Common	No. Shares Preferred
3.	Fred Shingle	2,500	2,500
4.	Horace J. Brown	1,250	1,250
5.	R. L. Mikel	1,250	1,250
6.	Axton F. Jones	1,250	1,250
7.	J. B. DeMaria	5,000	5,000
8.	F. P. Tommasini	1,500	1,500
9.	Paul Masoni	2,500	2,500
10.	Others	24,750	24,750
		40,000	40,000

		Common	Preferred
11.	Fred Shingle	230,000	230,000
12.	James V. Westbrook	60,000	60,000
13.	E. Byron Siens	120,000	120,000
14.	Howard Shores	60,000	60,000
15.	E. Byron Siens	30,000	30,000
16.	Frederic Vincent & Co.	60,000	60,000
		600,000	600,000

Realization from Disposition of 600,000 shares of Common Stock and 600,000 Shares of Preferred Stock of Italo Petroleum Corporation of America (per books and records) issued in acquiring properties of the Brownmoor Oil Company.

		Cash	Stock	
			Common	Preferred
1.	Montgomery Investment Co. Axton F. Jones Fred Shingle Horace J. Brown R. L. Mikel	$ 83,000		
2.	Fred Shingle		2,500	2,500
3.	Horace J. Brown		1,250	1,250
4.	Axton F. Jones		1,250	1,250
5.	R. L. Mikel		1,250	1,250
6.	J. B. DeMaria		5,000	5,000
7.	F. P. Tommasini		1,500	1,500
8.	Paul Masoni	25,000		
9.	John M. Perata	25,000		
10.	A. G. Wilkes	18,842.90		
11.	James V. Westbrook) Howard Shores) 288,000.00 E. Byron Siens)			
12.	Paul Masoni		21,000	21,000
13.	H. G. Edwards		9,000	9,000
	Totals	$439,842.90	45,250	45,250

52. The court erred in permitting Exhibits 297 and 299 to be taken to the jury room by the jury and considered by the jury during its deliberations over the objections of the defendants at the time. Said objections were made upon the ground that portions of the said exhibits had been ordered stricken therefrom, but had not been removed from said exhibits, the said portions having been ordered stricken by the court being designations thereon of the conclusion of the witness G. S. Goshorn that approximately 2,500,000 shares of stock designated on said exhibits as "Bonus Stock" received by the McKeon Drilling Co. Inc. from Italo Petroleum Corporation of America for the McKeon Drilling Co. Inc.'s assets was received by the defendants and that the said defendants realized the said "Bonus Stock", and further purporting to designate certain stock received by Frederic Vincent & Company as being for "Market Losses" and certain stock and money as having been the "realization" of defendants from the said 2,500,000 shares of stock, and the portion of the said exhibit ordered stricken from the said Exhibit 299 being that part thereof designating certain stock received by the defendants as "Bonus Stock", the said stock being a portion of the 600,000 units of stock issued by the Italo Petroleum Corporation of America for the assets of the Brownmoor Oil Company; and the said court erred in permitting the said jury to receive said exhibits in the said condition and the jury thereby examined, considered, and received evidence out of court and which was not in evidence; and said objection was made upon the further ground that the said jury by receiving and considering the said exhibits, without having the benefit of all testimony given by witnesses with respect to said exhibits, with the giving of undue prominence and consideraton to said ex-

hibits which had been admitted for the purposes of illustration only, all of which would be prejudicial to the defendants.

53. The court erred in denying defendants' motion to strike from the record Exhibits 297 and 299 made upon the grounds that the testimony of the witness Goshorn showed that said exhibits were incompetent, were made up in part from records which were not in evidence, and in part from statements made by individuals, which were hearsay, over defendants exceptions at the time.

54. The court erred in overruling defendants' objections to the admission in evidence of Exhibits 301 and 302, and in admitting said Exhibits as follows:

Counsel for the defendant Myers stipulated that a letter dated December 26, 1928, was sent by the defendant Myers, and that the two checks were signed by him.

Government counsel offered the letter and checks in evidence, and they were objected to as incompetent, irrelevant, immaterial, hearsay as to all defendants except the defendant Myers.

The letter was received in evidence and marked Exhibit 301, and the checks Exhibit 302. The exhibits are in substance as follows:

Memorandum dated 12-26-28 for Mr. Masoni stating that the purchase price of the Gillespie Modoc stock was $5,910.00 plus $492.50 commissions to Chamliss, that in dividing the stock the cost should be pro rated as folows:

A. G. Wilkes	$1600.00
Tommasini	1600.00
E. Byron Siens	1600.00
Maurice C. Myers	1602.50

Further stating that A. G. is not familiar with the details Masoni is requested to hand him the memorandum for his information.

The checks are dated 12-1928 for $5,910 and $492.50 and signed by Maurice C. Myers.

55. The court erred in overruling the separate motions interposed by each defendant to strike and/or limit certain evidence, which said motions were made after the Government had rested its case in chief, and the errors of the Court in denying each of the said motions are hereby separately assigned as error as follows:

Thereupon, in the absence of the jury, each of the defendants on trial and each of the appealing defendants herein, towit, Alfred G. Wilkes, E. Byron Siens, William J. Cavanaugh, Robert S. McKeon, John McKeon, Maurice C. Myers, Fred Shingle, and Horace J. Brown, each for himself interposed as to each of the documentary exhibits offered in evidence by the Government and received by the Court and marked Exhibits Nos. 1 to 303, inclusive, a motion that they each be stricken from the record and from evidence and excluded from consideration by the jury, upon the ground that each of said exhibits was incompetent, irrelevant, immaterial, hearsay, no proper foundation laid, not binding upon any of the defendants, and not within the issues raised by the cause, upon the ground that it was an attempt on the part of the Government to prove its case by proving admissions made by various defendants in the absence of proof of the corpus delicti. Particularly with respect to the books of account, records and minute books of the various corporations hereinafter described, each of the defendants interposed a separate motion to strike each of said exhibits upon each and all of

the grounds set forth in the lengthy objection interposed by each and all of the defendants, as stated and read by Senator West on the introduction in evidence of Exhibits 28-A, B, C, D, 29, 31 and 33, and upon each and all of the grounds contained in the lengthy objection and motion to strike made by Mr. Simpson to Exhibits 16-A, 16-B, 16-C, and 17, the minute books of the Italo Petroleum Corporation of America, and each of the defendants further moved to strike from the record all evidence, both oral and documentary, pertaining to the recipt by or the payment of any commissions by A. G. Wilkes, or the purported payment thereof to Frederic Vincent & Company, Louis R. Lourie, and R. E. Toomey, upon the ground that said matters were not charged in nor the subject of any allegation in the indictment, and further moved the court that if said motion to strike said last mentioned evidence be denied that the court limit the consideration of said testimony to the defendant Wilkes only, and instruct the jury not to consider it against any of the other defendants, on the grounds and for the reasons that such matters were not charged in the indictment, and therefore would not be binding upon any other defendant, and would be only admissible against the defendant Wilkes on the theory that it was offered and received for the purpose of showing intent upon his part under the similar offense doctrine, and would therefore not be admissible or considered against any other defendant. Said defendants, each for himself, interposed an identical motion with respect to the testimony of the witness Charles Behr pertaining to conversations relative to the payment of commissions for promotion, and also to the payment of sums of money for the purpose of securing the issuance of the permit of August 9, 1928, upon the same grounds on

which defendants moved to strike and limit the testimony with respect to purported commissions.

Each of the defendants further moved the court, separately, to strike from the record the testimony of all conversations testified to by any and all witnesses as having been had with any defendant outside of the presence of other defendants, as hearsay and not binding, and in the alternative moved the court that if such motion to strike be denied that the court limit such testimony of such conversations and instruct the jury to consider them only as to such defendant or defendants as were present and participated in such conversations or were shown by the evidence to have had knowledge thereof and to have ratified the same, upon the grounds that said testimony was hearsay and not binding upon said absent defendants, and upon such defendants as were not shown by the evidence to have had knowledge of such conversations and ratified the same.

The corporate books of account, records and minute books included in the said motion are described as follows: 3 to 17, 28-a to 37, both inclusive, 58, 86-a to 95, 99, 110; 183 to 228, 239, 241 to 245, 283, 284, 297, 298, 299.

56. The court erred in overruling defendants objections to the admission in evidence, and in denying their several motions to strike from the record and limit the testimony of the defendant, James V. Westbrook, concerning his explanations of Exhibit 155, which purported to be an interview had by the said Westbrook with agents of the Internal Revenue Bureau in November and December, 1929, which had been admitted in evidence as against the said Westbrook only, said objections and motions being as folows:

"Q. What became of the other $24,000.00? A. In order to accomplish the sale of the Brownmoor Oil Company to the Italo, we gave Mr. Bentley's one-fifth of our control to Mr. A. G. Wilkes, which gave Mr. Wilkes a one-fourth of the $288,000.00." What did you mean by that? Explain fully.

A. Well, as I say, when I was being questioned about that statement there and the way I was questioned, they did not allow me to explain until I would be interrupted.

Q. Well, that would not make any difference. All right, you have stated that. Now, you have got an opportunity to tell right here just what you meant by that statement.

A. I meant by that, not to accomplish the sale, to finance the sale which actually was, Mr. Siens told me that in order to finance the sale of the Brownmoor stock for Italo stock for Vincent & Company it was necessary to give Mr. Wilkes Mr. Bentley's interest, that Mr. Wilkes had to give as commission to somebody. I don't know who it was. Of course, I did not put all of that in it. They did not give me any opportunity.

Q. Well, at any rate, that is what you understood and what you meant by that statement, is that it?

A. That is all I knew of what Mr. Siens told me.

Q. BY MR. OLSON: Now, when you mentioned financing, you mean financing the sale of the stock to be received from the Italo to Vincent & Company?

A. Well, it was financing the sale of the Brownmoor stock to Vincent & Company which was later converted into Italo stock, as I understand it. I did not know but very little about it.

Q. Did you know anything about it except what was told you by Mr. Siens?

A. Nothing whatever.

Q. Reading further: "Q. Did Mr. Siens and Mr. Shores also give $24,000 of the amount they received to Mr. Wilkes?

A. They never gave him $24,000. He was to share and share alike with us four but he couldn't be mentioned so, according to our agreement, Mr. Frederick Vincent & Company were to pay Mr. Wilkes $24,000 each out of our $96,000.00.

"Q. Where did Mr. Vincent pay this money? A. Mr. Vincent was to pay it to the Merchants National Trust & Savings Bank of Los Angeles and to the credit of Mr. Siens, Shores and Westbrook."

"Q. Was this actually done? A. No, Mr. Vincent always sent a check to Mr. Siens and Mr. Siens, in turn, each month gave me my one-fourth.

"Q. And do you know if he made the same division with the other interested parties? A. It was always understood and we talked about it—these payments each month going to the four parties instead of three because I told the company several times that it was going to show when I filed my income tax returns that I got $96,000.00 and I only got $72,000.00 and I think that's the reason that they wouldn't send it to the bank and let the bank make the disbursements." Now then, did you ever pay Mr. Wilkes $24,000 or any part of it or any amount or sum whatsoever?

A. No, sir.

Q. Did you ever see him receive any money whatsoever?

A. None whatever.

Q. Now, when you say, then, in this statement or report that Mr. Siens and Mr. Shores gave Mr. Wilkes $24,000, that they received or implied that you gave him $24,000, you didn't mean to say that you ever knew of any other circumstances than that which you have related about Mr. Bentley's interest being given to Mr. Wilkes, is that it?

A. Well, I suppose it went to Mr. Wilkes. Mr. Siens told me so.

Q. I know, but you never saw Mr. Wilkes receive any money?

A. I never saw none of them receive any.

Q. You never saw anybody receive any part of that money but the money that you received, the $72,000 that you yourself received from Mr. Siens?

A. That is absolutely right.

Q. Now, you state further with reference to this matter as follows: "Then in your opinion the reason the disbursement was not made through the bank was to avoid the record that would be in the bank of the entire transaction? A. Yes, that is my opinion." Did you have the opinion that you were covering up an income tax return, or what was the opinion there about?

A. No, sir. I meant that Mr. Siens told me that we had to give it to Mr. Wilkes, and that Mr. Wilkes had to give it as a commission, so why would Mr. Wilkes be mentioned in it?

A. Well, you state further: "It was a part of the plan that Al Wilkes' participation in the split should be covered up? A. I don't know that it was to be cov-

ered up? A. I don't know that it was to be covered up in any way."

A. I knew nothing about it.

Q. "Q. But at least his name did not appear on any of the records? A. No, sir.

"*A.* Are you positive, Mr. Westbrook, that Al G. Wilkes got $72,000.00 out of this division? A. Yes, sir." Did you ever answer that that way?

A. I believe I did.

Q. Now, just explain how you are positive Mr. Wilkes got 72,000 out of that transaction.

A. Because I actually believe Mr. Siens gave it to him as he told me he did because he had to give it to somebody else as commission.

Q. But I mean, you did not see the transaction?

A. I knew nothing of it, no, sir.

Q. You knew nothing of it except the information given you by Mr. Siens as to Mr. Wilkes?

A. That is right.

Q. So all you know about that is pure hearsay and what Mr. Siens told you about that, is that right?

A. That is all it was. Just what Mr. Siens told me. I never saw any of the papers.

Q. Or did you see or know about any of the dealings that Siens or Wilkes or anybody had with Vincent & Company as far as their relations or dealings with Vincent & Company, d*u*d you have anything to do with them?

A. I never did other than signing that agreement.

Q. Outside of that, did you have any relationship whatsoever or any dealings that might have been had

with Vincent & Company or anybody else in connection with the Brownmoor stock or the Italo stock?

A. I never did. I never met the Vincent people until I think it was 1931.

Q. Now, you say, "Q. Do you know what reason Mr. Wilkes had, if any, for not wanting to appear openly in this transaction? A. No." Well, if you didn't know any reason Mr. Wilkes had for not wanting to appear openly in the transaction, what reason did you have for saying that he could not be mentioned in the transaction? Just explain that.

A. Well, if Mr. Siens was giving him the money that had to go to somebody else for a commission, why, I would not know whether he had any reason for not wanting to be mentioned in it or not. I never had talked to Mr. Wilkes about it. All I ever talked to was Mr. Siens. And I saw a lot of things in that statement then that I did not have records of, it was hearsay, from Mr. Siens, and I was under oath, and I did not know what it meant to be under that, I am not saying that I do not know what it means to be under oath now.

Q. Now, Mr. Westbrook, you have already stated that this information you received, whatever it was, from Mr. Siens was at the time you made this contract to sell the 60,000 units, your 60,000 units together with the other trust stock to Vincent & Company for $288,000, and is that the agreement to which you refer when you say Mr. Vincent was to pay this $288,000 to Shores, Siens, and myself? That is the agreement you referred to?

A. That is the agreement I referred to.

MR. WOOD: Pardon me. If the Court please, I desire at this time to move to strike out from the record all evidence given by this witness in regards to wherein he testified that Mr. Siens told him that Mr. Wilkes was going to do certain things. The testimony of this witness pertains to the document in question, his affidavit, and the ruling has heretofore been made that as to that affidavit it is binding only upon this witness. And if the motion is denied, then in the alternative, I will ask the Court or move the Court to instruct the jury to consider such statements as the witness is now making or volunteering to make relevant to any explanation concerning that document or its evidence only against him and not against any other defendant in this case.

THE COURT: Well, I was wondering about that as the examination proceeded. The original interview has heretofore been read, has it not, Mr. Redwine?

MR. REDWINE: Yes, your Honor.

THE COURT: And it was admitted as against this Mr. Westbrook only?

MR. REDWINE: Yes, your Honor.

THE COURT: Which was on the theory that it took place after the conspiracy had ceased. Now, on cross examination certain excerpts are read from it, but the witness is questioned a great deal at length as to matters which do not appear in the interview.

MR. REDWINE: We resist any motion to strike any of the testimony of this witness relative to any conversation between himself and Mr. Siens concerning Mr. Wilkes. We think that the conversations are binding on Mr. Wilkes and binding on Mr. Siens. For this reason, when this document was introduced in evidence, it

was hearsay as to all of the defendants except Westbrook, because it was a statement made by Westbrook after the conspiracy had ceased. Now, we have the testimony of Mr. Westbrook given on a conversation between himself and Mr. Siens during the period of time that we claim the conspiracy was in existence. That is not hearsay. That is testimony given from the witness chair by a witness under oath and is binding on all of the defendants.

THE COURT: I am of the opinion that the evidence given by the witness now, being other than that contained in the statement, is admissible as against the parties affected by it.

MR. WOOD: Exception.

MR. WEST: Would your Honor at this time direct the jury to disregard this evidence as against any other defendants except Mr. Westbrook and Mr. Siens, who had the conversation? Of course, the others would not be bound by that.

I move that it be confined or binding only upon the defendant Westbrook and the defendant Siens, your Honor.

THE COURT: Motion denied.

MR. WEST: Exception:

57. The court erred in overruling defendants' objections to the whole of the exhibit marked Exhibit 155 being taken by and considered by the jury in the jury room during its deliberations; in permitting said Exhibit 155 to be so taken to the jury room and considered by the jury during its deliberations, said objections being made upon the ground that the said Exhibit 155 contained prejudicial statements, hearsay statements of the defend-

ant Westbrook which had been ordered stricken from said exhibit, but which had not been removed therefrom, and the said matters ordered stricken therefrom were not in evidence and should not be sent to or considered by the jury because said jury would be receiving evidence out of court; upon the further ground that the said portion of the said Exhibit 155 not in evidence should be eliminated thereon before being taken to the jury room, and upon the further ground that the said Exhibit 155 had been received in evidence as against the defendant Westbrook only and the jury should be again instructed and cautioned to consider it only as to the defendant Westbrook and as not being binding upon any other defendant, all of which was done over the exceptions of the defendants at the time. That portion of Exhibit 155 ordered stricken therefrom and which was not received in evidence but which was nevertheless sent to the jury room and considered by the jury during its deliberations to the prejudice of the defendants is as follows:

The following portion thereof was taken from an interview November 12, 1929, between J. V. Westbrook and Special Agent Cornelius of the Bureau of Internal Revenue relative to the net income of E. Byron Siens:

Q. Do you know of any account carried by either Mr. or Mrs. Siens under an assumed name?

A. No sir.

Q. Do you know of any source of income of Mrs. Siens?

A. She has none that I know of.

Q. How long have you *know* Mr. and Mrs. Siens?

A. I have known Mr. Siens since 1921 and I have known Mrs. Siens about two and one-half years—maybe three.

Q. Do you know anything about this boat which was built for Mr. Siens?

A. Why, I understood that he and Mr. Wilkes were building a yacht which was costing $100,000 and some odd dollars.

Q. Do you know anything about the Sunset Exploration Company?

A. No, I do not. Have heard of it.

Q. Do you know what disposition has been made of this boat?

A. I understood it was sold some few weeks ago.

Q. Do you know to whom it was sold?

A. No, I do not.

Q. It is understood, Mr. Westbrook, that you are still under oath and that such answers as you may care to make to questions propounded to you will be on the same conditions as the interview held on November 12,

A Yes sir.

Q. Did Mr. Siens ever have any talk with you relative his 1928 income tax return?

A Yes sir.

Q. Did he ever talk with you about any income tax liability he may have had for prior years?

A Yes sir.

Q. Did he tell you that he owed the Government any money for prior years' tax liability?

A. Yes sir.

Q. What did he say relative to paying any outstanding tax liability?

A. I remember that he said he made the Government an offer of—I thought it was $10,000.00, and then they found out something and wouldn't settle for the $10,000.00.

Q. Did he *may* any request of you in connection with your tax return for 1928 to get you to have your return agree with one he proposed to file for himself?

A. He told me a way that we could charge off a lot of money and claim that we put the money in the Brownmoor, through an attorney—a Mr. Shreve in San Diego, as he intended to show that he borrowed $45,000.00 and paid it back and that he could show that he made an investment and it was at a total loss in San Diego through Mr. Shreve.

Q. Then if I understand you right, Mr. Westbrook, Mr. Siens told you that he was going to claim that he had a $45,000.00 investment in Brownmoor stock and that he was going to arrange this transaction through Attorney Shreve of San Diego, is that correct?

A. Well, I don't know if it is Attorney Shreve or not. One is an attorney and the other isn't. I don't know whether it was Attorney Shreve or not but it was along those lines any way. It was either through Attorney Shreve or his brother.

Q. Do you know of any oil property from which Mrs. Siens receives a royalty?

A. No sir.

Q. Do you know of any oil property at Long Beach in which Mr. Siens may be interested?

A. He is interested in the Allied Petroleum and he may be interested in a well that we furnished the pipe for—$9200.00 worth—and which was told me a total loss to us (Shores, Siens and Westbrook).

Q. What well was that Mr. Westbrook?

A. Well, the Union Oil Company took it over and Thomas Bailes was drilling it at that time.

Q. What was the name of the lease or the location?

A. I couldn't tell you that.

Q. Was it in the Signal Hill field.

A. It was on Atlantic—near the frog pond and near the Hoyt lease.

Q. To whom did you furnish this $9200.00 worth of pipe?

A. To Mr. Bailes, I am positive. We put in the pipe which cost $9200.00 and were to receive the $9200.00 back out of—I think it was 25% of the oil—I am not positive of that—and then a permanent interest of 10% of the well, of which the Union finally finished this well.

Q. Have you ever received anything as a result of this transaction?

A. No.

Q. Do you have any definite knowledge at this time as to whether Mr. Shores or Mr. Siens did?

A. No sir, I haven't.

Q. Do you have any knowledge as to whether this well was subsequently put on production?

A. I know it is a very good well today.

Q. Do you consider at this time that you still have an equity in this well?

A. Well, it looks as though I should have unless it was officially quit-claimed back and we took the loss, of which there never were any minutes or any meetings held on it in the Brownmoor.

Q. You have signed no quit-claim yourself have you, Mr. Westbrook?

A. No sir.

Q. Nor have you been advised that any has been signed in your behalf by either Mr. Shores or Mr. Siens?

A. No sir.

(Mr. Cornelius)

Q. Mr. Westbrook, certain papers were secured from you through an Internal Revenue Summons (Form 860). These papers are herewith being returned to you. Are they complete and in the same order in which we received them?

A. Yes sir, they are all here."

The said Exhibit 155 was signed James V. Westbrook and sworn to before an Internal Revenue Agent.

58. The court erred in overruling defendants objections to and in denying their motions to strike the following testimony, and the District Attorney was guilty of misconduct in asking such questions, and the court guilty of misconduct in denying defendants' motions and in making the prejudicial statements to the jury hereinafter set forth:

MR. REDWINE: Q. Then all you know about that check is the fact that it was endorsed by Mr. Myers in the office, and you went with Mr. Siens over to the bank,

and you endorsed the check over at the bank, you got the $30,000, and you handed the $30,000 to Mr. Siens?

A. That is correct.

Q. And Mr. Siens departed with the $30,000?

A. We walked back to the Biltmore Hotel—

Q. And where he went with it or what he did with it, you don't know.

A. No.

Q. You don't know whether that $30,000, or any portion of it, was used for the purpose of obtaining a permit for the Italo Petroleum Corporation of America?

A. I don't know.

MR. WOOD: I object to that question, your Honor, and ask it be stricken out, and cite the statement of the District Attorney as misconduct. This witness has stated he didn't know, and Mr. Redwine has suggested, in the face of the evidence showing a lack of knowledge of what it was used for, an insinuation that it was used for an unlawful purpose, and I cite that remark at this time as misconduct on the part of the District Attorney.

THE COURT: No, I do not think that is misconduct. I do not think that is any kind of misconduct. It is the business of this Court and this jury to trace that $30,000 to the nethermost limit. The truth will show. That is our business here. The objection is overruled.

MR. WOOD: Exception.

59. The court erred in the following proceedings held during the cross-examination of the defendant Robert S. McKeon as a witness in his own behalf:

Q. I show you a Western Union telegram under date of April 23, 1929, and ask you if you have seen that before?

A. I seem to remember that telegram, yes.

Q. To whom is it directed?

A. To myself.

Q. And by whom is it signed?

A. By John McKeon.

MR. WHARTON: I offer the telegram just identified in evidence.

MR. WOOD: If the Court please, may I ask the witness some general questions here?

THE COURT: Oh, I don't know. It is a telegram actually received, wasn't it?

MR. WOOD: Now, if the Court please, if counsel agree that it should be entered—

THE COURT: Why waste time for a thing like that, Mr. Wood? Mr. McKeon, did you receive that telegram?

A. I believe I did.

Q. Well, did you or did you not?

A. Well, it is a number of years ago. I recall a similar telegram.

Q. Oh, never mind what you recall.

A. Well, I will say that I did.

Q. All right; that is sensible on your part, let me tell you.

Now, then, gentlemen, there is nothing further to that, is there?

MR. WOOD: I wish to make a motion at this time following some general questions of Mr. McKeon, a motion to suppress this evidence, if I may be allowed so to do?

THE COURT: Motion denied. Proceed with the examination.

MR. WOOD: Exception.

60. The court erred in overruling objections to the admission of evidence, in admitting evidence over such objections, and in refusing and failing to instruct the jury as requested by the defendants that the said evidence was admitted for a limited purpose only as against some of the defendants, and in particular failing and refusing to instruct the jury as follows: That they were not to consider any evidence, objected to by the defendants as proving or tending to prove that the defendants Fred Shingle, Horace J. Brown, John McKeon and William J. Cavanaugh, or either or any of them, were parties to or had any secret arrangement or agreement to receive back from the McKeon Drilling Company all or any part of 2,500,000 shares of stock of the Italo Petroleum Corpration of America issued to the McKeon Drilling Co. Inc. as part of the purchase price for the McKeon Drilling Co. Inc.'s assets, or as proving or tending to prove that they or any of them sold any of the said 2,500,000 shares of stock under or pursuant to any such secret arrangement or agreement to which they were parties or which they had knowledge, or that they, or either or any of them, falsely represented to the Corporation Commissioner of the State of California that the McKeon Drilling Co. Inc. was receiving 4,500,000 shares of said stock when in fact they knew and intended that said McKeon Drilling Co. Inc. was only receiving 2,000,000 shares thereof, or any evidence as proving or tending to prove that the said named defendants should receive for their own use or benefit 2,500,000 shares of said stock. The said objections and motions were made by the defendants upon the ground that the defendants, Fred Shingle, Horace J. Brown, John McKeon and Wil-

liam J. Cavanaugh were not charged in the indictment or bill of particulars with having been parties to any of said transactions and that the admission of testimony as against them was in plain violation of the allegations of the indictment and the bill of particulars, upon which the defendants had relied, and that they were taken by surprise by the offer of such evidence as against them and were unprepared to meet the same; all of which rulings of the court were made to the manifest prejudice of these defendants. That said objections were made to Exhibit 297 and to the testimony of the witness Goshorn with respect thereto, and also to the testimony of Fred Shingle, Horace J. Brown and other evidence both oral and documentary.

61. The court erred in overruling objection to the admission in evidence and in admitting in evidence Exhibit No. 299 over objections made by the defendants that the matters thereon contained were in violation of the indictment and the bill of particulars in that certain defendants were named in said Exhibit as having participated in certain transactions respecting the distribution of 600,000 shares of common and 600,000 shares of preferred stock of the Italo Petroleum Corporation of America issued as a part of the purchase price of the assets of the Brownmoor Oil Company and with respect to the testimony of the witness Goshorn relative thereto; and in failing and refusing to limit the effect of such evidence to those defendants who were charged in the indictment or bill of particulars and shown by the evidence to have participated in such transactions.

62. The court erred in refusing to interpret the indictment and/or the bill of particulars when requested by

counsel for the defendants Fred Shingle and Horace J. Brown, to interpret the same, and in refusing to advise the said defendants that neither the defendant Fred Shingle nor Horace J. Brown was charged in either the indictment or bill of particulars, or whether there was any evidence admitted to prove that they were charged, with being parties to or having knowledge of any secret arrangement or agreement to obtain all or any part of the 4,500,000 shares of stock issued by the Italo Petroleum Corporation of America to the McKeon Drilling Co. Inc. and which was referred to by the District Attorney as "secret profits", and in further refusing to advise the said defendants that they were not so charged in the indictment or the bill of particulars and that they were not charged with the selling, or receiving the proceeds from the sale, of any such or said stock or any part thereof, and in failing and refusing to instruct the jury that the said defendants making the said requests were not so charged in either the indictment or the bill of particulars, all of which was done over the exception of the defendants at the time and without waiving any rights theretofore interposed by the said defendants to the introduction of any evidence.

63. The District Attorney was guilty of misconduct and the court erred in permitting the District Attorney in his opening argument to the jury to refer to and read testimony that had been ordered stricken from the record, and in failing to instruct the jury to disregard such argument and such testimony, and in failing to rebuke the District Attorney in the presence of the jury for making such argument, which said testimony so stricken from the record was given by the witness Douglas Fyfe,

in which he in substance stated that he had informed the defendant John M. Perata that the defendant Alfred G. Wilkes was "an unscrupulous promoter", all of which was over the following objection and exception of the defendants:

"MR. REDWINE: * * * Again, at page 219 of the transcript Mr. Fyfe testifies that he gave the following notice and warning to these defendants. He testifies as follows:

"I stated that I did not know Mr. Wilkes personally, but I did know of him by reputation. That his reputation was that of a pure promoter".

And then he says, "I think I used the term "unscrupulous"—

MR. SIMPSON: We assign that statement of the District Attorney as misconduct on the grounds and for the reason that the Court ordered that particular portion of the testimony stricken from the record, and Government counsel is referring to matters that are not before the Court or jury.

MR. REDWINE: Let's see page 219 of the transcript.

THE COURT: Well, I have no recollection of the matter as to this. There was stricken from the record particular details of what somebody told about Mr. Wilkes. That was stricken from the record, because obviously I think it had no place there.. The general nature, however, of the information given, I think, was properly in the record for whatever it might have been worth.

MR. REDWINE: I can read your Honor the record.

MR. SIMPSON: If you will read further in the record, you will find that, I believe, on the following day the court upon motion of Mr. Olson or some one else ordered it stricken.

THE COURT: Well now, just a minute. You put your heads together there and read what the record says. Then we will know. Mr. Redwine will do the reading.

Thereupon Mr. Redwine read from the record the portion thereof in dispute as hereinabove set forth, and the defendants called the Court's attention to the following motion, and ruling, made by them at said time:

"MR. WOOD: I move that the language "I think I used the term unscrupulous" be stricken out and that the jury be instructed not to consider it. It is purely an opinion of the witness.

THE COURT: Yes, that should be definite, and the motion is granted, and the jury is so instructed. Further explain, Mr. Fyfe, what did you mean by saying you think?

A. That is my memory of the conversation.

THE COURT: Very well."

MR. SIMPSON: I submit that I am correct in that the Court did order it stricken out.

THE COURT: No. It will stand just as it is;

That a statement made to those present - - to whom was this statement made, Mr. Perata?

MR. REDWINE: Mr. Perata and Mr. Masoni.

THE COURT: As to characterizing or giving his opinion as to the statement as to the reputation of Mr. Wilkes was properly in the record. Go on.

MR. SIMPSON: Exception.

64. The District Attorney was guilty of misconduct during his opening argument to the jury and the Court erred in refusing to permit the assignment of such argument as misconduct and in permitting the District Attorney to make such argument, and in failing and refusing

to instruct the jury to disregard such argument of the District Attorney. Said argument and the rulings thereon which are separately assigned as error, being as follows:

MR. REDWINE: (Continuing) He (Mr. Fyfe) testified as follows: "Mr. Perata had called me into the room in the Biltmore and asked me how I thought things were going along with the Italo Company. I told him quite frankly that I thought the Italo was getting in very bad shape, that it was generally rumored that the Italo was buying properties at prices very much more than their value. That men of very bad reputation were being brought into the company. The company was getting a very bad name, and that if he was not careful, the result would be that he and his Italian stockholders would suffer heavy losses. Mr. Perata told me that he realized that the men he was dealing with were, I think if I may use the expression, pretty tough customers, but that he was watching them, and that they would not put anything over on him."

Now, Mr. Perata and Mr. Masoni—

MR. OLSON: If the Court please, I assign as error and misconduct on the part of counsel the reading of the statement that Mr. Fyfe told the defendants referred to that men of bad reputation were coming into the company, because I distinctly know that I made a motion to strike that out, and on the following day your Honor ordered it stricken.

MR. REDWINE: I don't recall that. If that happened, it is not in the transcript here.

THE COURT: Proceed.

MR. OLSON: Exception.

MR. REDWINE: Now, the evidence shows that there is a $25,000 item that is missing. Mr. Masoni claims that he got 21,000 shares of stock instead of the credit in the Montgomery Investment Company, and I will read that testimony later, but this fact remains that there was $25,000 credited to Mr. Masoni's account. There is a lapse of $25,000 in some place. The testimony as a whole probably shows this: That Wilkes went in and got that $25,000 out of the future account of Mr. Masoni that was to go into the big syndicate.

MR. WOOD: Now, if the Court please, I object to that statement, because there is nothing in this evidence to that extent, and that is merely an unjustifiable inference drawn by the District Attorney.

THE COURT: Clearly, Mr. Wood, and I am sure that this is the rule, that counsel in arguing to the jury may indulge his own conclusions from what is shown in the evidence. I certainly would be sorry to think that there was any other rule in times past. Now, don't interrupt. Please don't do that. Those interruptions are unseemly entirely.

65. That there was manifest prejudice to the defendants, and each of them, in the statement of the District Attorney several times made during the trial, calling attention to the alleged fact and making the statement that certain evidence was in the possession of the defendants and requesting stipulations of the facts that were to be shown thereby. The error being in that such statements tended to coerce the defendants and each of them, into producing evidence against themselves and into becoming witnesses in violation of their rights under the Constitution of the United States, and the court erred

in not forbidding such conduct and in not instructing the jury to disregard the same, or otherwise endeavoring to protect the rights of the defendants against an obvious prejudice thereby created against them.

66. That the court erred in requiring the defendant Robert S. McKeon, to stand up and exhibit himself to a witness before the jury for the purpose of identification, thus requiring him to furnish evidence against himself in violation of his rights under the Constitution of the United States, which protects him against furnishing such evidence.

67. The District Attorney and the Court were guilty of prejudicial misconduct in permitting the District Attorney after the jury had returned to the jury room for further instructions to state to the jury the following:

MR. REDWINE: And may I make one further suggestion to the Court?

THE COURT: Yes, sir.

MR. REDWINE: I believe your Honor instructed the jury that the defendants or any of them could be found guilty on any of the counts of the indictment, and each count of the indictment is a separate and distinct charge as against the defendants.

THE COURT: Yes, that is true. I don't know myself whether I called attention to that. However, attention was called to the fact that each defendant must be separately considered with respect to each charge, and, of course, all defendants may be acquitted or all convicted, or some acquitted and some convicted, as you may find proper.

MR. WOOD: If the Court please, I desire that the record show and the jury be instructed that the statement of the District Attorney concerning his voluntary statement about the conviction of any defendant upon any count of the indictment was uncalled for and unwarranted for the purpose of the Court bringing the jury into this room. Counsel for the defendants have not had an opportunity of knowing in advance what the jury desires, and the statement of the District Attorney concerning the condition of any defendant on any count I believe is unwarranted, if the Court please.

THE COURT: Very well. That will be noted as an exception.

68. The court erred in sustaining the objection of the District Attorney to the following questions and in refusing to permit the following cross-examination of the witness G. S. Goshorn called as a rebuttal witness by the Government:

Q. Now, you have given some testimony respecting these matters, I believe you referred to them as profit, and stated that in the books of Shingle, Brown & Company they were carried into the accounts as income. Did you examine the books and records of Shingle, Brown & Company for the years ending December 31, 1928 and 1929, for the purpose of ascertaining the profit and loss account of that firm from all of their transactions?

A. I have for the year '29; not for '28.

MR. REDWINE: Object—well, no.

Q. BY MR. SIMPSON: What period of time did you say that these pool operations were carried into the records as income or receipts or profits, or whatever you want to call it?

A. In the year '29.

Q. Oh, they were carried in the year '29—I will ask you if it is not a fact that from an examination of the books and records of Shingle, Brown & Company for the year, calendar year 1929, it shows total earnings of $1,229,692.09 from all operations?

A. Which are you speaking of, the corporation or the partnership?

Q. I am talking about the consolidation of the two.

A. I have not them consolidated here.

Q. What do you have?

A. Nor have I the single total on all the income. I can give it to you. All the income items are here.

Q. What did you take, just the corporation or the partnership?

A. No, I have both of them.

Q. Isn't it a fact that for the year 1929 the total earnings for the partnership were $727,904.75?

MR. REDWINE: That is objected to on the ground that it is incompetent, irrelevant and immaterial and not proper cross examination.

MR. SIMPSON: I think it is material. Apparently the Government seems to think there was some significance about making a profit out of some transaction. We expect to show that this was all part of a general business operation expenses and other expenses were so much, and get the conclusion as to the net results from all operations.

THE COURT: If there is anything culpable in the profit made from the stock of the Italo, do you think that that would be lessened by the fact that they might have made losses on some other stock?

MR. SIMPSON: I don't think, your Honor, that there is any culpability in the transaction at all.

THE COURT: Well, I know you don't.

MR. SIMPSON: But the Government seems to, and they are bringing this in as rebuttal, and I did not object to it because I thought the Court might want to get the whole picture, but I do think so long as they are emphasizing these matters that it is important to show that, as Mr. Shingle has already testified, that the expenses of these concerns during this time ran between thirty and forty thousand dollars a month and to show that this was just one transaction out of a large volume of business.

THE COURT: Well now, Mr. Simpson, my distinct recollection is that the identical question came up during the examination of—

MR. SIMPSON: The same witness.

THE COURT: As I remember, Mr. Shingle, and I expressed the opinion at that time, that it did not make any difference what he made or lost on other matters, if it assumed, and on that the Court expressed no opinion that there is anything culpable with his transactions with respect to this stock, it would not make any difference in the world that he might have made losses on other totally unrelated transactions. I think that is obvious. The objection is sustained.

MR. SIMPSON: We take an exception. I was going to inquire of this witness, your Honor, with respect to the gross income, the expenses and the earnings, and I understand from the ruling of the Court that I am not permitted to do so, is that correct?

THE COURT: Yes.

MR. SIMPSON: So that it would be understood that I would make an offer to prove those things along those lines and the Court's ruling is the same, and I take an exception.

69. The court erred in overruling objections made to the admission of oral and documentary evidence, and in refusing to limit the consideration by the jury of such evidence as to certain defendants, which said objections and motions were made upon the ground that the said evidence was not within the issues raised by the indictment, but was in violation or contradiction of the allegations of the indictment and the bill of particulars.

70. The court erred in refusing to give to the jury the following Instruction No. XXII requested by the defendants, Fred Shingle and Horace J. Brown, and adopted by the remaining defendants, which said instruction was not fully covered by the other instructions given by the court, and to the refusal to give said instruction the defendants then and there duly excepted:

"You are instructed that a bill of particulars has been furnished to the defendants in this case, by order of this court. The purpose of a bill of particulars is to advise the court, and more particularly the defendants, of what facts, in more or less detail, the defendants will be required to meet upon the trial of a case, and the Government is limited in its evidence to those facts so set forth in the bill of particulars, as having been done or committed by any particular defendant. When furnished a bill of particulars it concludes the rights of all parties to be affected by it, and the Government in this case must be and is confined to the particulars they have specified in the bill of particulars as having been done or said by any of the particular defendants. The mere fact, however, that the Government states in the bill of particulars that any particular defendant or defendants did engage in any of the transactions therein alleged is not to be

considered by you as any evidence whatsoever that such defendant or defendants did engage in such transaction; but it must be proven by the evidence to your satisfaction beyond a reasonable doubt that such defendant did knowingly participate in such transaction.

However, the Government is limited and restricted in its evidence to the particulars specified in the bill of particulars and is not permitted to prove that any defendant or defendants not named in the bill of particulars as having engaged in a particular transaction did engage therein. In other words, the effect of the bill of particulars in this regard, is that the government says that under the evidence the particular defendant did not engage in the particular transaction not specified as having been engaged in by him.

U. S. v. Gouled, et al. 253 F. 239

U. S. v. Adams Express Co. 119 F. 240

Commonwealth v. Giles, 1 Gray (Mass.) 466

Dunlap v. United States, 165 U. S. 486 (41 L. ed. 799)"

71. The court erred in refusing to give to the jury the following Instruction No. 1 requested by the defendants, Fred Shingle and Horace J. Brown, which said instruction was not fully covered by the other instructions given by the court, and to the refusal to give said instruction the defendants then and there duly excepted:

"You are instructed that there is no evidence in this case, that the defendants, Fred Shingle, Horace J. Brown, or Axton F. Jones, or either or any of them, had knowledge of, or participated in the organizing of the Italo

American Petroleum Corporation, or participated in the issuing, or selling, of the capital stock of the said Italo American Petroleum Corporation".

72. The court erred in refusing to give to the jury the following Instruction No. II requested by the defendants, Fred Shingle and Horace J. Brown, which said instruction was not fully covered by the other instructions given by the court, and to the refusal to give said instruction the defendants then and there duly excepted:

"You are instructed that there is no evidence in this case that the defendants, Fred Shingle, Horace J. Brown, or Axton F. Jones, or either or any of them, organized, or caused the organization of, the Italo Petroleum Corporation of America, or that they issued, or caused to be issued, the capital stock of the said Italo Petroleum Corporation of America."

73. The court erred in refusing to give to the jury the following Instruction No. III requested by the defendants, Fred Shingle and Horace J. Brown, which said instruction was not fully covered by the other instructions given by the court, and to the refusal to give said instruction the defendants then and there duly excepted:

"You are instructed, as a matter of law, that the management of the business affairs of a corporation is vested in the Board of Directors thereof.

Sec. 9 of General Corporations Laws of the State of Delaware.

Calif. Civil Code, Sec. 305, 290, superseded by the amendment of 1931 contained in Civil Code Sec. 305.

There is no evidence in this case, that the defendants, Fred Shingle, Horace J. Brown, or Axton F. Jones, or either or any of them, dominated or controlled the activities or conduct or business of the Italo American Petroleum Corporation or the Italo Petroleum Corporation of America; nor is there any evidence that they or either or any of them were officers or directors of either of said corporations. It is admitted in this case that they were not officers or directors of either of said corporations."

74. The court erred in refusing to give to the jury the following Instruction No. IV requested by the defendants, Fred Shingle and Horace J. Brown, which said instruction was not fully covered by the other instructions given by the court, and to the refusal to give said instruction the defendants then and there duly excepted:

"You are instructed that there is no evidence in this case that the defendants, Fred Shingle, Horace J. Brown, or Axton F. Jones, or either, or any of them, on or about May 16, 1928, loaned to the Italo Petroleum Corporation of America the sum of $80,000; nor is there any evidence that they, or either of them, received, from the Italo Petroleum Corporation of America, a bonus for the making of a loan of $80,000 to the said Italo Petroleum Corporation of America".

75. The court erred in refusing to give to the jury the following Instruction No. V requested by the defendants, Fred Shingle and Horace J. Brown, which said instruction was not fully covered by the other instructions given by the court, and to the refusal to give said instruction the defendants then and there duly excepted:

"You are instructed that there is no evidence in this case that the defendants, Fred Shingle, Horace J. Brown, or Axton F. Jones, or either or any of them, caused the Italo Petroleum Corporation of America to enter into an agreement for the purchase of the assets of the Brownmoor Oil Company. There is no evidence that they knew what the terms or provisions were that were to be contained in any agreement between the said Italo Petroleum Corporation of America and the said Brownmoor Oil Company or what consideration the Italo Petroleum Corporation of America agreed to pay for the assets of the Brownmoor Oil Company".

76. The court erred in refusing to give to the jury the following Instruction No. VI requested by the defendants, Fred Shingle and Horace J. Brown, which said instruction was not fully covered by the other instructions given by the court, and to the refusal to give said instruction the defendants then and there duly excepted:

"You are instructed that there is no evidence in this case that the defendants Fred Shingle, Horace J. Brown, or Axton F. Jones, or either or any of them, at any time filed or caused to be filed with the Corporation Commissioner of the State of California any application or applications for a permit or permits for the issuance to the Brownmoor Oil Company, or the stockholders of the Brownmoor Oil Company, of any of the stock of the Italo Petroleum Corporation of America, agreed by the Italo Petroleum Corporation of America to be paid by it as a part of the purchase price of the assets of the Brownmoor Oil Company. There is no evidence that they, or either or any of them, had knowledge of, or participated in, any of

the transactions had between the Italo Petroleum Corporation of America, and the Brownmoor Oil Company, or between either of said corporations and the Corporaction Commissioner of the State of California respecting the purchase by the Italo Petroleum Corporation of America of the assets of the Brownmoor Oil Company."

77. The court erred in refusing to give to the jury the following Instruction No. XXII-A requested by the defendants, Fred Shingle and Horace J. Brown, which said instruction was not fully covered by the other instructions given by the court, and to the refusal to give said instruction the defendants then and there duly excepted:

"That there is no evidence in this case, and you are not to consider any evidence in this case, as proving or tending to prove, that the defendants Fred Shingle, Horace J. Brown, or Axton F. Jones, or either or any of them, were directors of the Italo Petroleum Corporation of America, or that they caused the Italo Petroleum Corporation of America to enter into an agreement with the Brownmoor Oil Company providing for the purchase of the assets of the Brownmoor Oil Company by the Italo Petroleum Corporation of America or that they caused the Italo Petroleum Corporation of America to issue 600,000 shares of its preferred or 600,000 shares of its common capital stock as a part of the purchase price to be paid for the said assets of the Brownmoor Oil Company; or that they filed or caused to be filed with the Commissioner of Corporations of the State of California, an application for a permit to issue said 600,000 shares of the preferred or 600,000 shares of the common capital stock of the said Italo Petroleum Corporation of America, as a part of the

purchase price to be paid for the said assets of the Brownmoor Oil Company.

United States v. Gouled, 253 F. 439
Bill of Particulars, p. 3, par. 4-c and 4-d
Bill of Particulars, p. 4, par. 4-h".

78. The court erred in refusing to give to the jury the following Instruction No. VIII requested by the defendants, Fred Shingle and Horace J. Brown, which said instruction was not fully covered by the other instructions given by the court, and to the refusal to give said instruction the defendants then and there duly excepted:

"You are instructed that there is no evidence in this case that the defendants, Fred Shingle, Horace J. Brown, or Axton F. Jones, or either or any of them, wrongfully or otherwise received a part of the stock of the Italo Petroleum Corporation of America issued by it as a part of the purchase price of the assets of the Brownmoor Oil Company; there is no evidence that they or either or any of them unlawfully or wrongfully received any of the proceeds derived from the sale of the shares of stock issued by the Italo Petroleum Corporation of America as a part of the purchase price of the assets of the Brownmoor Oil Company. Fraud is never presumed and the burden is upon the person claiming fraud to prove it to your satisfaction by competent evidence beyond all reasonable doubt. In the absence of such evidence you are to presume that the said defendants were innocent of any wrongful or fraudulent conduct."

79. The court erred in refusing to give the jury the following Instruction No. XII-B requested by the defendants, Fred Shingle and Horace J. Brown, which said instruction was not fully covered by the other instructions given by the court, and to the refusal to give said instruction the defendants then and there duly excepted:

"There is no evidence in this case, and you are not to consider any evidence in this case, as proving or tending to prove that the defendants Fred Shingle, Horace J. Brown, or Axton F. Jones, or either or any of them, caused the Italo Petroleum Corporation of America to enter into an agreement with the McKeon Drilling Co. Inc., by the terms of which the Italo Petroleum Corporation of America agreed to purchase or did purchase certain assets of the McKeon Drilling Co. Inc., or that they or either of them caused said agreement to provide that an excessive consideration should be paid for said assets; or that they caused the issuance of, or the delivery to, the McKeon Drilling Co. Inc. of 4,500,000 shares of the capital stock of the Italo Petroleum Corporation of America as a part of the consideration to be paid for said assets of the McKeon Drilling Co. Inc."

U. S. v Gouled, 253 F. 439

Bill of Particulars, p. 5, par. 2".

80. The court erred in refusing to give to the jury the following Instruction No. XXII-C requested by the defendants, Fred Shingle and Horace J. Brown, which said instruction was not fully covered by the other instructions given by the court, and to the refusal to give said instruction the defendants then and there duly excepted:

"You are instructed that there is no evidence in this case, and you are not to consider any evidence in this case, as proving or tending to prove that the defendants Fred Shingle, Horace J. Brown, or Axton F. Jones, or either or any of them, should, or that they did apply to the Commissioner of Corporations of the State of California for a permit to issue stock of the Italo Petroleum Corporation of America for the purpose of acquiring or purchasing the properties of various companies, including the properties of the McKeon Drilling Co. Inc.; there is no evidence that they, or either or any of them, should, or that they did, represent to the Commissioner of Corporations of the State of California in making said application, that the Italo Petroleum Corporation of America, had made an agreement with the McKeon Drilling Co. Inc. to issue or deliver to the McKeon Drilling Co. Inc. 4,500,000 shares of the capital stock of the Italo Petroleum Corporation of America as a part of the purchase price to be paid by it for the said properties of the McKeon Drilling Co. Inc.; there is no evidence that defendants, Fred Shingle, Horace J. Brown, or Axton F. Jones, or either, or any of them at the time said application was filed with the Corporation Commissioner of the State of California, knew or intended that the McKeon Drilling Co. Inc. should or that it did receive only 2,000,000 shares of the said stock of the Italo Petroleum Corporation of America issued as a part of the purchase price for the assets of the McKeon Drilling Co. Inc.

U. S. v Gouled, 253 F. 439

Bill of Particulars, p. 6, par. O-4 incorporating par. L-5."

81. The court erred in refusing to give to the jury the following Instruction No. XXII-D requested by the defendants, Fred Shingle and Horace J. Brown, which said instruction was not fully covered by the other instructions given by the court, and to the refusal to give said instruction the defendants then and there duly excepted:

"You are further instructed, in accordance with the foregoing rules respecting the effect of bills of particulars, that there is no evidence in this case, and you are not to consider any evidence in this case, as proving or tending to prove that the defendants, Fred Shingle, Horace J. Brown, or Axton F. Jones, or either, or any of them, had any secret arrangement or agreement either among themselves or with any of the other defendants whereby they, or any of the defendants, were to receive back, or did receive back, from the McKeon Drilling Co. Inc. 2,500,000 shares of the capital stock of the Italo Petroleum Corporation of America, issued by that company as a part of the purchase price for certain assets of the McKeon Drilling Co. Inc. either without the knowledge or consent of the stockholders of the Italo Petroleum Corporation of America, or without giving any consideration therefor.

Bill of Particulars, p. 5, par. 4

Bill of Particulars, p. 6, par. O-1"

82. The court erred in refusing to give to the jury the following Instruction No. XXII-F requested by the defendants, Fred Shingle and Horace J. Brown, which said instruction was not fully covered by the other instructions given by the court, and to the refusal to give said instruction the defendants then and there duly excepted:

"You are further instructed that there is no evidence in this case, and you are not to consider any evidence in this case, as proving or tending to prove, that the defendants Fred Shingle, Horace J. Brown, or Axton F. Jones, or either or any of them, were parties to or had knowledge of any secret arrangement or agreement, if any there was, whereby any defendant in this case was to receive back from the McKeon Drilling Co. Inc. all or any part of the 2,500,000 shares of the capital stock of the Italo Petroleum Corporation of America issued as a part of the purchase price for certain assets of the McKeon Drilling Co. Inc."

83. The court erred in refusing to give to the jury the following Instruction No. XII-G requested by the defendants, Fred Shingle and Horace J. Brown, which said instruction was not fully covered by the other instructions given by the court, and to the refusal to give said instruction the defendants then and there duly excepted:

"In accordance with the rules stated to you with respect to the effect of bills of particulars, you are further instructed that there is no evidence in this case, and you are not to consider any evidence in this case, as proving or tending to prove, that the defendants, Fred Shingle, Horace J. Brown, or Axton F. Jones, or either or any of them, should, or that they did sell, or cause to be sold to some of the persons designated in the indictment, as the persons to be defrauded, any stock of the Italo Petroleum Corporation of America, received by them from the McKeon Drilling Co. Inc.; or that any such stock was sold by them, if any was sold, was sold pursuant to any secret

arrangement or agreement to which they were parties or of which they had knowledge.

U. S. v. Gouled, 253 F. 439

Bill of Particulars, p. 6 par. O-3"

84. The court erred in refusing to give to the jury the following Instruction No. XIV requested by the defendants, Fred Shingle, and Horace J. Brown, which said instruction was not fully covered by the other instructions given by the court, and to the refusal to give said instruction the defendants then and there duly excepted:

"You are instructed that there is no evidence in this case, that the defendants, Fred Shingle, Horace J. Brown, or Axton F. Jones, or either or any of them, sold or caused the selling of any stock issued by the Italo Petroleum Corporation of America as the result of any secret arrangement or agreement, of which they had knowledge, or to which they were parties. The mere fact that the said defendants may have received some of the shares of stock issued by the Italo Petroleum Corporation of America as part of the purchase price paid by it for the assets of the McKeon Drilling Co. Inc. creates no presumption that it was issued to the said Fred Shingle, or Horace J. Brown, or Axton F. Jones, or that it was received by them, pursuant to any secret arrangement or agreement. You are instructed that there is no presumption that written instruments are without consideration. On the contrary, the law presumes that all parties are honest, that the usual

course of business has been followed, and that a written instrument was executed for a valuable consideration, and that it is free from fraud.

Thompson v. Thompson, 140 Cal. 545 at 548

Toomey v. Dundhy, 86 Cal. 639

Wenban Estate, Inc. v. Hewelett, 193 Cal. 675

Metropolitan Life Assn. v. Escat, 75 Cal. 513 at 518

Calif. Civil Code, Sec. 1614 and 1615."

85. The court erred in refusing to give to the jury the following Instruction No. XVI requested by the defendants, Fred Shingle and Horace J. Brown, which said instruction was not fully covered by the other instructions given by the court, and to the refusal to give said instruction the defendants then and there duly excepted:

"You are instructed that, although it is alleged in the indictment, that some of the defendants made representations in order to induce persons to part with their money and property, which representations it is alleged in the indictment were false and untrue, there is no evidence in this case that the defendants, Fred Shingle, Horace J. Brown, or Axton F. Jones, or either or any of them, represented to any of the persons described as the "persons to be defrauded" that the McKeon Drilling Co. Inc. was receiving 4,500,000 shares of the capital stock of the Italo Petroleum Corporation of America as a part of the consideration for the properties of the said McKeon Drilling Co. Inc.

There is no evidence in this case that the defendants, Fred Shingle, Horace J. Brown or Axton F. Jones, or any or either of them, ever stated or represented that the Italo Petroleum Corporation of America was properly or efficiently managed, or that it had made profitable acquisitions.

There is no evidence in this case that the defendants, Fred Shingle, Horace J. Brown, or Axton F. Jones, or either or any of them, stated or represented that following the formation of the Italo Petroleum Corporation of America, it at once undertook a sound development program.

You are instructed that there is no evidence in this case, that the defendants, Fred Shingle, Horace J. Brown, or Axton F. Jones, or either or any of them, stated or represented that what had become one of Italo Petroleum Corporation of America's most important and valuable assets was the recent acquisition by the said Italo Petroleum Corporation of America of the world's famous *Temple* Petroleum Refining Patent."

86. The court erred in refusing to give to the jury the following Instruction No. XXIV requested by the defendants, Fred Shingle and Horace J. Brown, which said instruction was not fully covered by the other instructions given by the court, and to the refusal to give said instruction the defendants then and there duly excepted:

"You are instructed that there is no evidence in this case that the defendants, Fred Shingle, Horace J. Brown, or Axton F. Jones, had any knowledge of the entries contained in the books of account of the McKeon Drilling Co.

Inc., or the books of account of the Brownmoor Oil Company or the books of account of the Italo American Petroleum Corporation, or the books of account of the Italo Petroleum Corporation of America.

See People v. Doble, 203 Cal. 510 at 516 and 517."

87. The court erred in refusing to give to the jury the following Instruction No. XXIII requested by the defendants, Fred Shingle and Horace J. Brown, which said instruction was not fully covered by the other instructions given by the court, and to the refusal to give said instruction, the defendants then and there duly excepted:

"You are instructed that with respect to the declarations of one defendant made by him outside of the presence of any other defendant, that before such declarations are competent as to any such absent defendant, it must be proved beyond all reasonable doubt by independent evidence that the scheme or artifice to defraud alleged in the indictment had been devised and that such absent defendant was a party thereto, and it must further be established that such declaration was made by such defendant in furtherance of the said scheme or artifice. It is only where knowledge and active participation, or an express or implied ratification can be proved, that one defendant is bound by the statements or declarations of another. The fact that the declarations were made before a defendant may have become associated with an alleged scheme or conspiracy, if any there was, does not of itself render the declarations inadmissible against him. However, his subsequent connection with the alleged scheme or conspiracy must be shown to your satisfaction beyond all reasonable doubt by independent evidence, and knowledge of the ex-

istence of such declaration must be brought home to him, or circumstances must be shown from which such knowledge of such declarations and a ratification thereof by him may be implied or inferred. If the evidence does not show that any such defendant had knowledge of such declarations, or that having such knowledge he impliedly or expressly ratified it, you are not to consider such declarations as to such defendant. You are to keep this instruction in mind in considering the evidence of declarations made by some of the defendants in the absence of the defendants Fred Shingle, Horace J. Brown and Axton F. Jones.

Underhill Crim. Ev. Sec. 718
Marrash v. U. S. 168 F. 225
Wallace v. U. S. 245 F. 300
U. S. v. Babcock, 3 Dillon 581
Roberts v. U. S. C. C. A. 9 (248 F. 873)
Miller v. U. S. 133 F. 337 at 353
People v. Schmidt, 33 Cal. App. p. 426
Pope v. United States, 289 F. 312."

88. The court erred in refusing to give to the jury the following general request for Instruction No. 41 requested by all the defendants, which said instruction was not fully covered by the other instructions given by the court, and to the refusal to give said instruction the defendants then and there duly excepted:

"You are instructed that some of the defendants have introduced evidence before you tending to show their good character and reputation for truth, honesty and integrity. If, in the present case, the good character and reputation

of any defendant, for these qualities is proven to your satisfaction, then such fact is to be kept in view by you in your deliberations, and it is to be considered by you in connection with the other facts in the case, and if, after a consideraction of all the evidence in the case, including that bearing upon the good character and reputation of the said defendants, the jury entertain a reasonable doubt as to such defendants' guilt, then it is your duty to acquit any such defendant. Proof of good character and reputation in connection with all the other evidence, may generate a reasonable doubt, which entitles the defendant proving such good character and reputation to an acquittal, even though without such proof of good character the jury would convict.

People v. Mitchell, 129 Cal. 584
Taylor v. State, 149 Ala. 32.
White v. U. S. 164 U. S. 100; (41 L. ed. 365)
McKnight v. U. S. (97 Fed. 208) C. C. A. 6
Searway v. U. S. (184 Fed. 716.)"

89. The court erred in giving the following instruction to the jury over the exception of the defendants at the time:

In the Federal courts there is no presumption that the accused is of good character. Neither can he be presumed to be of bad character, but if the good character of the person accused of crime is proven for the traits of character involved in the charges against him and in the case on trial, it must be considered by you in connection with all of the other facts and circumstances brought out by evidence admitted on this trial, and, if after such con-

sideration, the jury is not satisfied beyond a reasonable doubt of the defendant's guilt of the offense for which he is being tried, they should acquit him. But if they are satisfied from all the evidence in the case that the defendant is guilty of the charge for which he is being tried, you should convict him notwithstanding his proof of good character.

90. The court erred in overruling objections to the admission of evidence and denying the motions to strike and limit testimony interposed during the examination of the witness R. E. Toomey as follows:

With respect to Exhibits Nos. 71 and 72, I never received 30,000 shares of common or 30,000 shares of preferred stock from Mr. Wilkes, and never received any of the stock of the Italo Petroleum Corporation of America from Mr. Wilkes.

I did not perform any services relative to the Modoc lease for Mr. Wilkes. I made a physical examination of the Maine State properties for Mr. Wilkes. I did not receive any commission as a result of that examination. For all the work that I did for the Italo Petroleum Corporation of America or Mr. Wilkes, I received a total of $3,500. I received this check dated November 20, 1928, and had a conversation with Wilkes at that time in the presence of Mr. Cavanaugh.

The conversation was objected to on behalf of all defendants not present at the conversation, upon the ground that it was incompetent, irrelevant, and immaterial, hearsay, referring to matters not alleged in the indictment, and therefore only competent against those defendants par-

ticipating in the conversation, and a request was made that the court so instruct the jury.

Objection overruled. Exception.

The defendants Wilkes and Cavanaugh objected to the introduction of the two exhibits and any evidence along the lines of commission, and any testimony by the witness, upon the ground that it tends to prove an isolated transaction not in any manner connected with any issue in the case, and not being alleged in the indictment as a part of the alleged scheme, and it tends to bring into the case the testimony concerning an independent crime, and for that reason said testimony is prejudicial to the defendants Wilkes and Cavanaugh, and is incompetent, irrelevant and immaterial.

Objection overruled. Exception.

The conversation was that I asked Mr. Wilkes for some money for some stock I could sell. He said, "I will get you some," and he brought it in. He said, "Half of this is mine, and please give him a check for it", meaning Mr. Cavanaugh. This is the check Wilkes gave me.

Government counsel offered the check in evidence, and it was objected to upon the same grounds as were interposed to the conversation testified to by the witness. Defense counsel requested the court to give the same instruction theretofore requested, that such evidence was binding only as to the defendants Wilkes and Cavanaugh.

Objection overruled. Exception.

The check was received in evidence, marked Exhibit 129, and is dated November 20, 1928, to the order of R. E. Toomey for $5,000, signed by Fred Shingle, Syndicate Manager, by Horace J. Brown.

Thereafter I gave Mr. Cavanaugh $3000.00, which included $2500 plus $500 I owed him, so the check I gave him was for $3000. This is the check that I made out to Mr. Cavanaugh.

Government counsel offered the check in evidence, and it was objected to as incompetent, irrelevant, immaterial, not tending to prove any of the issues in the case, hearsay as against every defendant in the case, and no proper foundation laid.

Objection overruled. Exception.

The check was marked Exhibit 130, dated November 21, 1928, payable to W. J. Cavanaugh, for $3000, and signed R. E. Toomey.

I signed receipts at the request of Mr. Wilkes, but never received any stock.

91. The court erred in failing and refusing to give to the jury Instruction No. 30 requested by all of the defendants, which said instruction was not fully covered by other instructions given by the court, over the exceptions of the defendants at the time:

You are instructed that by the finding of an indictment no presumption whatsoever arises to indicate that a defendant is guilty, or that he had had any connection with, or responsibility for, the act or acts charged against him. A defendant is presumed to be innocent at all stages of the proceedings until the evidence introduced on behalf of the prosecution shows him to be guilty beyond a reasonable doubt. This rule applies to every material element of the offense charged. The burden of proof is upon the government in this case to show the guilt of each defendant, and

all the presumptions of law, independent of evidence, are in favor of the innocence of each defendant. And in this case, the court instructs you that if, after you have considered all the evidence in the case, you then have a reasonable doubt as to the guilt of the defendant or any defendant, then such defendant as to whom you have such a reasonable doubt is entitled to the benefit of that doubt, and you should acquit him. Mere suspicion will not authorize a conviction as to any defendant. A reasonable doubt is such a doubt as you may have in your minds when, after fairly and impartially considering all of the evidence, you do not feel satisfied to a moral certainty of the defendant's guilt.

Reasonable doubt is not mere possible doubt, because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty of the truth of the charge. The burden of proof is upon the prosecution. All the presumptions of law, independent of evidence, are in favor of innocence; and every person is presumed to be innocent until he is proved guilty. If upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal. For it is not sufficient to establish a probability though a strong one arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary, but the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and

judgment of those who are bound to act conscientiously upon it. And, whenever, after a careful consideration of all of the evidence, your minds are in that state where a conclusion of innocence is indicated equally with a conclusion of guilt, or there is a reasonable doubt as to whether the evidence is so balanced, the conclusion of innocence must be adopted.

Judge James' Instructions in U. S. v. Sugarman, et al.

Commonwealth v. Webster, 5 Cush. 711

52 Am. Dec. 730 at 731 for Definition of Reasonable Doubt.

92. The court erred in giving to the jury the following instruction over the exception of the defendants at the time that it was not a correct statement of the law:

A reasonable doubt, as that term is employed in the administration of the criminal law, is an honest substantial misgiving generated by the proof or want of it. It is such a state of the proof as fails to convince your judgment and conscience and satisfy your reason as to the guilt of the accused.

93. The court erred in failing and refusing to give to the jury Instruction No. 55 requested by all of the defendants, which said instruction was not fully covered by other instructions given by the court, over the exceptions of the defendants at the time:

You are instructed that all of the evidence which has been received in this case is not applicable to all of the defendants. Only such evidence as tends to directly con-

nect a particular defendant with the offenses charged in the indictment can be considered by you in determining the guilt of that defendant. With respect to the books of account and other records of the various corporations concerning which testimony has been admitted, you are instructed that the mere fact that a defendant is an officer, director, or employee of such company, does not make such books in anywise admissible as to him. Before any entry in such books can be considered by you in determining the guilt of any defendant, it must first be proven to you beyond a reasonable doubt that such defendant made, or caused to be made, that particular entry, or that it was made with his knowledge and under his supervision. Unless you so find, no entry in the books of account can be considered by you in any manner as proving or tending to prove the guilt of any defendant.

Osborne v. U. S. (17 F. (2) 246) C. C. A. 9

94. The court erred in giving to the jury the following instruction over the exception of the defendants at the time that it was not a correct statement of the law:

Some of the defendants have testified that they did not know the contents of the books and records of any of the corporations involved in this prosecution, and in this connection you are instructed that if you find from the evidence that such defendants dominated and controlled and had access to the books and records of such concern or concerns, and that such books and records were kept under their direction, you may infer that they had knowledge of the contents thereof for everyone who is in control of an organization and has the right of access to its books and records and under whose direction such books

and records are kept is charged with knowledge of their contents.

95. The court erred in giving the following instruction to the jury over the exception and objection of the defendants at the time that it was not a correct statement of the law:

All witnesses are presumed to speak the truth while on the witness stand. This presumption, however, is a disputable one, and may be repelled by the manner in which your witness testifies, by his reputation for truth and integrity, by the probability of his testimony and to the extent to which it is corroborated by known facts in the case, or by his sympathies with either side of the case and the extent to which, either favorably or adversely he might be affected by the result. If a witness has knowingly given false testimony upon a material matter in the case, the jury is at liberty to distrust his testimony in other respects, even to the extent of rejecting the whole of his testimony. These principles apply to the defendant when testifying as a witness in his own behalf and to all other witnesses.

96. The court erred in failing and refusing to give to the jury Instruction No. 42 requested by all of the defendants, which said instruction was not fully covered by other instructions given by the court, over the exceptions of the defendants at the time:

You are the sole judges of the credibility and the weight which is to be given to testimony of the different witnesses who have testified upon this trial. A witness is presumed to speak the truth. This presumption, however,

may be repelled by the manner in which he testifies; by the character of his testimony or by the evidence affecting his character for truth, honesty, and integrity, or his motives; or by contradictory evidence, or by showing that he has been convicted of a felony. In judging the credibility of the witnesses in this case, you may believe the whole or any part of the evidence of any witness, or may disbelieve the whole or any part of it, as may be dictated by your judgment as reasonable men. You should carefully scrutinize the testimony given, and in so doing consider all of the circumstances under which any witness has testified, his demeanor, his manner while on the stand, his intelligence, the relation which he bears to the prosecution or the defendants, the manner in which he might be affected by the verdict and the extent to which he is contradicted or corroborated by other evidence, if at all, and every manner that tends reasonably to shed light upon his credibility. If a witness is shown knowingly to have testified falsely on the trial touching any material matter, the jury should distrust his testimony in other particulars, and in that case you are at liberty to reject the whole of the witness' testimony, except in so far as it is corroborated by other credible evidence.

Instructions of Judge James in U. S. v. Sugarman, et al.

97. The court erred in giving the following instruction to the jury over the exception of the defendants at the time that it was not a correct statement of the law:

While it is true that a man is presumed to intend the probable and natural consequences of his own acts, wilfully and intentionally done, yet this presumption is a

rebuttable one and may be repelled by other facts and circumstances in the case and should be taken into consideration by you in connection with all the facts and circumstances of this case. The Government must establish that the necessary effect of carrying the scheme mentioned in the indictment into effect was to defraud the persons of their money or property, and that the defendants knew that such would necessarily be the effect.

The good faith of the defendants and each of them, or their bad faith in these matters is to be determined and their several acts and declarations construed and interpreted by the conditions existing at the time the statements were made, as they appeared to them at the time and not by the final result of the enterprise or their present condition or situation.

You, as reasonable and honest men, should endeavor to put yourself in the position of each defendant at the time the matters complained of by the Government are alleged to have occurred to the end that you may determine whether or not the defendants under consideration were acting in good faith or with a fraudulent intent and purpose.

I desire to add to that this suggestion: It is right and proper that the acts of the defendants should be viewed from, or rather, with reference to the conditions as existing at that time. It is also right and proper and incumbent upon the jury to remember, particularly so far as the written evidence is concerned, that it was done contemporaneously with the acts; that is to say, it is done at the same time and at a time when, so far as the evidence in the case shows, there was no likelihood, certainty at

least, other than what the law itself imposes, that the acts would be questioned.

The jury may well bear in mind in interpreting the documents any inference to be drawn from the documents in evidence, that they were contemporaneous acts.

98. The court erred in giving the following instruction to the jury over the exception of the defendants at the time that it was not a correct statement of the law or of the allegations of the indictment or bill of particulars:

That for the purpose of inducing the persons to buy stock of the said Italo Corporation, and to lead them to believe that they were purchasing stock in a company which was then and there operating at a profit, the defendants Wilkes, Perata, Masoni, DeMaria, Siens, Westbrook, Shores, John McKeon, Robert S. McKeon, Raleigh B. McKeon, Myers, Lyons, Cavanaugh, Shingle, Brown, Jones, and Mikel should and they did pay dividends which should not be and were not paid from the net earnings, but were paid out of the capital of the said corporation.

That for the purpose of inducing the persons to be defrauded to part with their money and property they made certain false pretenses and statements by means of conversations, letters, circulars, and other printed matter which representations should be and were substantially:

First: That the McKeon Drilling Company was receiving 4,500,000 shares of the capital stock of the Italo Corporation as a part of its consideration for its properties by the said Italo Corporation, when in truth and in fact the said McKeon Drilling Company was receiving only 2,500,000 shares of the said Italo Corporation stock.

Two: That the said Italo Corporation was properly managed and it had made profitable acquisitions, when in fact such was not the case.

Third: That the said Italo Corporation undertook a sound development program, meaning the acquisition of the properties of the McKeon Drilling Company, when in fact the contract to purchase the properties of the said McKeon Drilling Company was not a sound development program.

Fourth: That one of the said Italo Corporations most important assets was the acquisition of the famous Trumble Petroleum Refining Patents, when in fact the said Italo Corporation had not acquired, and never did acquire, the said Trumble Refining Patents.

Fifth: That the securities of the said Italo Corporation had been established as one of the soundest investments, when in truth and in fact they were not a sound investment at all.

The foregoing instruction given by the court attempted to instruct the jury that the indictment in the case as amplified and rendered definite by the bill of particulars furnished by the Government charged the defendants with doing the things stated in this given instruction.

99. The court erred in giving the following instructions to the jury over the exceptions of the defendants at the time that the said instructions were not correct statements of the law because the defendants were not charged with having placed the mail matter described in the post office at San Francisco, but with having knowingly caused the same to be delivered by mail:

The second count of the indictment charges that the defendants on or about March 9th, 1929, for the purpose of executing the scheme described, placed in the United States Post Office at San Francisco, a post paid envelope addressed to Grace E. Dennison, at Los Angeles, containing a circular dated March 8, 1929, and which has been admitted in evidence as Exhibit No. 268.

The sixth count of the indictment charges that the defendants on or about the 9th day of March, 1929, for the purpose of executing the scheme described, placed in the United States Post Office at San Francisco, a post paid envelope addressed to Mary E. Hill and La Vinna Hill Hopkins at Pasadena, containing a certain circular dated March 8, 1929, and which has been admitted in evidence as Exhibit No. 269.

The eighth count of the indictment charges that the defendants on or about the 12th day of August, 1929, for the purpose of executing the scheme described, placed in the United States Post Office at San Francisco, a post paid envelope addressed to La Vinna Hill Hopkins, at Pasadena, containing a certain circular, and which has been admitted in evidence as Exhibit No. 47.

The twelfth count of the indictment charges that the defendants on or about the 23rd day of January, 1929, for the purpose of executing the scheme described placed in the United States Post Office at San Francisco, a post paid envelope addressed to O. J. Rhode at Los Angeles, containing a certain letter dated January 23, 1929, and which has been admitted in evidence as Exhibit No. 234.

100. The court erred in giving the following instruction to the jury over the exception of the defendants at the time that the said instruction was not a correct statement of the law:

The Government of the United States has not authority to punish fraudulent scheme perpetrated within the State as such. That is ordinarily the duty of the State Authorities. It can, and it does say, however, that the Postal System of the United States shall not be used in aid of any dishonest or fraudulent scheme. It therefore has provided in this Statute that the United States Postal System, serving as it does, legitimate business, social intercourse, and the beneficial interests of the public, shall not be turned into an agency by which designing or dishonest persons may impose on the public any fraudulent practices.

101. The court erred in giving the following instruction to the jury over the exception of the defendants at the time that the said instruction was not a correct statement of the law:

I will instruct you at this time that it is not at all necessary that the scheme or artifice, if such there be, was successful. It is not necessary that the Government prove that anyone was actually defrauded thereby.

102. The court erred in giving the following instruction to the jury over the exception of the defendants at the time that the said instruction was not a correct statement of the law:

If you find that the letters were sent through the mails for the purpose of allaying discontent, restoring confi-

dence, or stimulating active support and so forth for the enterprise of the defendants, then you will find that the mailing of such letters comes within the provisions of Section 215 of the Federal Penal Code, being that which I have cited to you in substance.

As you have been advised the success or failure of the scheme is not material. Neither is it necessary that the evidence show that anyone was defrauded. If you find from the testimony introduced in this case that the letters in question passed through the mails, and that they were placed in the mails by the agents or clerks of the defendants, acting within the scope of their employment and in the usual course of business, the defendants caused the letters to be placed in a post office to be sent or delivered, within the meaning of the mail fraud statute.

103. The court erred in giving the following instruction to the jury over the exception of the defendants at the time that it was not a correct statement of the law;

You are advised that a director of a corporation occupies a fiduciary relationship to the corporation and to the stockholders. His position is one of trust, and he is frequently denominated a trustee. He is bound to act with fidelity, the utmost good faith, and with his private and personal interests subordinated to his trust duty whenever the two come into conflict. The same is true of its officers and of all other persons who dominate and control the affairs of the corporation. They must at all times deal fairly with those who own or are invited to purchase shares of the corporation and must fairly disclose all facts which might influence them in deciding upon the value and wisdom of purchasing the stock in such corporation.

104. The court erred in giving the following instruction to the jury over the exception of the defendants at the time that it was not a correct statement of the law:

While it is true that a contract between a corporation and one or more of its directors is not void or fraudulent, provided the interest of the director is known to the corporation; directors, or other officers are forbidden to make any profit by selling any property to the corporation of which they are directors or officers without making the fullest disclosure not only to the board of directors of such corporation, but also to those who are solicited to purchase the shares thereof. Directors and officers stand in a trust relation to the company and are bound at all times to act faithfully in the interests of the company and of the stockholders and proposed stockholders. To make any undisclosed profit for himself is fraudulent on the part of a director and to solicit the public to purchase shares without fully informing them of such profit to himself is a fraud upon them.

There is evidence in this case which, if believed by you beyond a reasonable doubt, will justify a finding that after the organizing of the Italo Petroleum Corporation of America some of the officers effected certain mergers and transferred to the Italo Corporation of America the assets and property of other corporations at a profit to themselves personally without disclosing such fact to those who had bought and were being invited to buy stock therein. It is for you to determine beyond a reasonable doubt from the evidence in the case whether or not this is the

fact, and if you so find it to be a fact, you would be warranted in finding that any defendant so doing did participate in the scheme and artifice to defraud described in the indictment.

105. The court erred in giving the following instruction to the jury over the exception of the defendants at the time that it was not a correct statement of the law:

It is not unlawful that directors of a corporation have an interest in property sold to the corporation and receive a part of the consideration therefor, even without disclosing such interest to the corporation, provided the transaction as to the corporation is just and reasonable. Directors, however, are forbidden from making any secret profits out of their relation. It is immaterial that the corporation has not been damaged by the transaction; secret profits belong to the corporation for the benefit of its stockholders and directors are under a duty, if they sell to the corporation, to make the sale without a profit unless they disclose that they are receiving such profit and the fact that the property at the time was worth the purchase price, it in no way relieves the directors of the duties and responsibilities resting upon them as fiduciaries.

Let me illustrate this matter of secret profits. A prominent business man, I know him well, was President and a member of the board of directors of a life insurance company recently organized, the stock of which had not been sold. The company entered into a contract with a firm of brokers for the sale of the stock for a percentage. The President of the corporation made a secret agreement with the brokers by which he received a percentage of the amount earned by the brokers aggregating some

$40,000. Learning of the secret agreement the corporation brought suit for recovery of this sum as secret profits. The defense was made that the services rendered by the President were worth the amount; that he had resigned a lucrative position with another firm to assist the sale of the stock; that his services were necessary in order to effectuate the sales.

It was held that the duty of securing the subscriptions was one enjoined by law upon the directors and that no director could lawfully make any secret profit in the matter of such subscriptions. That by making the secret agreement with the broker he acquired an interest that was possibly adverse to his fiduciary duty and he secretly placed himself in a position where conflict might arise between his trust duty and his personal interests. So that it is the law regarding the fiduciary duty, and you will observe in the course of these instructions that he is not permitted to occupy a position where he makes profits that are not disclosed to those whose interests he is bound to protect. In this particular case that claim was established and was paid from the estate long after his death.

106. The court erred in giving the following instruction to the jury over the exception of the defendants at the time that it was not a correct statement of the law:

Each party must be actuated by an intent to promote the common design. If persons pursue by their acts the same unlawful object, one performing one act, and a second another act, all with a view to the attainment of the object they are pursuing, the conclusion is warranted that they are engaged in a conspiracy to effect that object. Cooperation in some form must be shown. There must

be intentional participation in the transaction with a view and purpose to further the common design. And if a person, understanding the unlawful character of a transaction, encourages, advises, or in any manner, with a purpose to forward the enterprise or scheme, assists in its prosecution, he becomes a conspirator. And so a new party, coming into a conspiracy after its inception, with knowledge of its purpose and object, and with intent to promote the same, becomes a party to all of the acts done before his introduction into the unlawful combination, as well as to the acts done afterwards. Joint assent and joint participation in the conspiracy may be found, like any other fact, as an inference from facts proved.

107. The court erred in giving the following instruction to the jury over the exception of the defendants at the time that the said instruction did not include an instruction to the jury as to which of the witnesses that had testified in the case were accomplices:

Under the Federal practice a defendant or defendants may be convicted upon the uncontradicted testimony of an accomplice. That is, the testimony of a person who has participated in the acts charged constituting the offense. The testimony of an accomplice, however, is to be closely scrutinized and viewed with distrust in all the circumstances under which one who was an accomplice has testified his interest in the case, his demeanor and manner upon the witness stand, and the extent by which he may be affected by the verdict. All must be carefully considered.

108. The court erred in failing and refusing to give to the jury the following instruction requested by all of the defendants, which said instruction was not fully covered by other instructions given by the court, over the exceptions of the defendants at the time:

You are instructed that the evidence shows without contradiction that the properties which were sold by the McKeon Drilling Company to Italo Corporation of America were producing oil properties; that said properties were appraised and evaluated by disinterested competent petroleum engineers, who are experts in the valuation of oil properties; that said petroleum engineers valued the said properties at various prices, the minimum valuation being approximately $5,800,000.00; that the price contracted to be paid by the Italo Corporation of America to the McKeon Drilling Company for said properties was in part the assumption of an indebtedness not to exceed $500,000.00, in part the payment of $500,000.00 in money, in part the payment of $500,000.00 in notes, and in part the delivery of one million shares of the preferred capital stock and 3,500,000 shares of the common capital stock of said corporation. These facts having been proven, you are instructed that the transaction was just and reasonable and was not fraudulent, notwithstanding the fact that the defendant Robert McKeon at the time was interested in the McKeon Drilling Company and was an officer and director thereof and was also a director of the Italo Corporation of America, it being also shown by the undisputed evidence that Robert McKeon's connection with the McKeon Drilling Company was disclosed to the Italo Corporation of America and that fact was spread upon the minutes of a meeting of the Board of Directors

of said corporation held prior to the consummation of the transaction and at a time when said transaction was under consideration by the Board of Directors.

C. C. 311.

109. The court erred in failing and refusing to give to the jury the following instruction requested by all of the defendants, which said instruction was not fully covered by other instructions given by the court, over the exceptions of the defendants at the time:

You are instructed that it is lawful for directors of a corporation to be interested in properties sold to the corporation and to be interested in the consideration which the corporation pays for such properties, and it is lawful for such officers and directors not to disclose to the corporation, or its other officers or directors, their interest in the transaction or in the consideration paid by the corporation, if the transaction as to the corporation is just and reasonable at the time it was authorized, made or approved. In other words, secrecy as to the interest of directors and officers in a transaction is lawful, provided the transaction as to the corporation is just and reasonable; that is to say, provided the properties acquired by the corporation are of a value commensurate with the consideration which the corporation pays therefor. Therefore, if you believe from the evidence that the value of the properties transferred to the corporation by the McKeon Drilling Company was commensurate with the value of the money and stock which the Italo Corporation of America paid therefor, the fact, if you find it to be a fact, that one or more of the officers or directors of the Italo Corporation of America was interested in the transaction,

in that such officer or director received a part of the consideration paid by the Italo Corporation of America for said properties, would not make the transaction fraudulent but on the contrary said transaction would be lawful.

110. The court erred in failing and refusing to give to the jury the following instruction requested by all of the defendants, which said instruction was not fully covered by other instructions given by the court, over the exceptions of the defendants at the time:

You are instructed that under the laws of the State of California, it is lawful for a corporation to issue all or any part of its capital stock in payment for properties transferred to it by its promoters, directors, or any other person or persons, and that under the laws of said State, it is lawful for the interested parties to put a valuation upon speculative property, such as oil leases or oil wells, based upon the opinions of petroleum engineers or other experts, for the purpose of fixing the number of shares of stock to be paid for said properties, and that the par value of the stock to be issued, as full or part payment for such properties, is not to be deemed or considered as its actual or intrinsic value, nor is the stock exchange or curb exchange price of stock to be considered or deemed as its actual value. The value of stock issued in payment for properties is determined by the value of the assets owned by the corporation, after deducting therefrom all of the liabilities of the corporation, other than its stock liability.

111. The court erred in overruling the separate demurrers of the defendants William J. Cavanaugh, E. Byron Siens and Maurice C. Myers made upon the same grounds as hereinabove set forth in assignments of error numbered 5, 6, 7 and 8.

112. The court erred in denying defendants' motion that the court instruct the jury that the statements of the defendant Lyons contained in his affidavit executed in October, 1929, marked Exhibit 180, as to the value of certain properties of Italo Petroleum Corporation of America including the properties of the McKeon Drilling Company are not evidence as to what the value of said properties was in 1928 when they were acquired by said Italo Petroleum Corporation of America.

113. The court erred in overruling defendants objections to questions propounded to the defendant William J. Cavanaugh on cross-examination by Government counsel and in making the following prejudicial comment in the presence of the jury with respect to said defendant Cavanaugh's testimony, which said comment in effect informed the said jury that the court did not believe the testimony given by said defendant Cavanaugh:

Q. If you had filed an income tax as his agents, you would have filed that tax in his name, would you not?

A. I don't know; I don't know enough about it.

MR. ABRAHAMS: If the Court please, I object to this line of inquiry. It calls for a legal conclusion and it resolves itself into a legal argument as to the proper way in which to make an income tax return. Now, counsel for the Government has stated that certain rules prevailed in the making of income tax returns—

THE COURT: I don't care to hear argument. Now, Mr. Abrahams, this cross-examination illustrates the value, in my judgment, of cross-examination. I will not comment on the character of the testimony of this witness, although I might properly do so; I don't care to. Nevertheless, the cross-examination of the Government is both pertinent and entirely proper.

MR. ABRAHAMS: It assumes a legal position, however, that is not tenable.

THE COURT: Well, wait a moment. An examination testing the good faith of his statements made here in the presence of all of us. The objection must be overruled.

MR. WOOD: Exception.

114. The court erred in failing and refusing to give to the jury the following instruction requested by all of the defendants, which said instruction was not fully covered by other instructions given by the court, over the exceptions of the defendants at the time:

You are instructed that a director of a corporation may advance money to it, may become its creditor, may take from it a mortgage or other security, and may enforce the same like any other creditor, subject only to the obligation of acting in good faith. It is not a fraud upon the corporation or its stockholders for a director to fail to disclose to the corporation, or to the other directors, that he is the real lender, where the loan is nominally made by another person or by a syndicate of which the director was a member. In the absence of proof of bad

faith it was not a fraud upon the Italo Petroleum Corporation of America for any director of the Italo Petroleum Corporation of America to be a member of the syndicate which loaned $80,000 to the Italo Petroleum Corporation of America; nor was it wrongful for him to fail to disclose this fact to the corporation or its stockholders.

There is no presumption that the face value or par value of the capital stock of a corporation is its real value. The fact that the price paid by the syndicate for the 6,000,000 shares of capital stock of the Italo Petroleum Corporation of America may have been less than its par value or less than its actual value did not make the contract or transactions illegal or fraudulent.

Castle v. Acme Ice Cream Co. 101 Cal. App. 94 at 101

O'Dea v. Hollywood Cemetery Ann. 154 Cal. 67.

Schnittger v. Old Home, etc. Mining Co. 144 Cal. 603, 606

2 Thompson Corpn 3rd Ed. Sec. 1352

Stensgard v. St. Paul Real Est. etc. Co. 50 Minn. 429; 17 L. R. A. 575

115. The court erred in failing and refusing to give to the jury the following instruction requested by all of the defendants, which said instruction was not fully covered by other instructions given by the court, over the exceptions of the defendants at the time:

You are instructed that there is no presumption that the stock of a corporation is worth its par or face value. A certificate of stock is only evidence that the holder has an interest in the corporation , and its franchises and property, in the proportion that the stock held him bears to the whole amount of stock; but the certificate of stock is no evidence of the financial standing of the corporation, nor of the value of its franchises and property. Neither is there any presumption that the face value or the par value of the capital stock of a corporation is its real value. The fact that the price paid by the syndicate for the 6,000,000 shares of the capital stock of the Italo Petroleum Corporation of America may have been less than the par value of that stock, or less than its face value, or less than its actual value, did not make the contract or the transactions relative thereto illegal or fraudulent.

Schnittger v. Old Home etc. Mining Co. 144 Cal. 603 at 606.

2 Thompson on Corporations 3rd Ed. Sec. 1352

Stensgard v. St. Paul Real Estate Title Ins. Co., 50 Minn 429 (17 LRA 575)

WHEREFORE, the appealing defendants, Alfred G. Wilkes, E. Byron Siens, William J. Cavanaugh, Maurice C. Myers, Robert S. McKeon, John McKeon, Fred Shingle and Horace J. Brown, each separately for himself prays that by reason of the errors aforesaid and contained in these amended and supplemental assignments of error,

that the judgments and sentences imposed against them and each of them be reversed and held for naught.

Buell R. Wood
(Buell R. Wood)
Attorney for defendants Alfred G. Wilkes, E. Byron Seins and William J. Cavanaugh.

Maurice C. Myers
Attorney for Defendant, Maurice C. Myers.

A G Divet
(A. G. Divet)
Neil McCarthy
(Neil McCarthy)
A L Abrahams
(A. L. Abrahams)
Attorneys for defendants, John McKeon and Robert S. McKeon,

H. L. Carnahan
(H. L. Carnahan)
W. E. Simpson
(W. E. Simpson)
J. E. Simpson
(J. E. Simpson)
Attorneys for Fred Shingle and Horace J. Brown, defendants.

[Endorsed]: Received copy of the within ASSIGNMENTS OF ERROR, ETC. this 25th day of October 1933 Gwyn S. Redwine D. H. Attorney for Plaintiff Filed Oct 25 1933 R. S. Zimmerman, Clerk By Thomas Madden, Deputy Clerk.

[Title of Court and Cause.]

ORDER ALLOWING APPEAL OF DEFENDANT, MAURICE C. MYERS.

Upon reading and filinf the petition for appeal of the defendant Maurice C. Myers in the above entitled cause, and good cause appearing, and the defendant Maurice C. Myers having filed his Assignment of Errors herein

IT IS ORDERED that an appeal be hereby granted to him from the judgment and sentence herein to the United States Circuit Court of Appeals for the Ninth Circuit; that said appeal be and the same is hereby made a Supercedeas and that said defendant be released on bail pending the final disposition of said appeal upon the filing of a bond herein in the sum of Five Thousand Dollars ($5000.00) with good and sufficient sureties approved by this Court; that such bail bond shall not operate as a supercedeas insofar as concerns the issuance of an execution to collect any fine imposed unless proper supercedeas bonds are given for that purpose.

Geo. Cosgrave

Judge of the United States District Court for the Southern District of California, Central Division.

Dated: July 28th 1933.

[Endorsed]: Filed Jul 28 1933 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk

[Title of Court and Cause.]

ORDER ALLOWING APPEAL AND FIXING BONDS OF HORACE J. BROWN, DEFENDANT.

Upon motion of Horace J. Brown, through his attorneys, upon the filing of the petition for appeal from the verdict, judgment and sentence entered herein against the said Horace J. Brown, together with assignments of error filed herein, it is hereby

ORDERED, that an appeal be and it is hereby allowed the defendant, Horace J. Brown, to have reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, the verdict, judgment, sentence and orders rendered and entered herein against the said defendant, Horace J. Brown; and it is further

ORDERED, that pending said appeal, said defendant be released from custody on bail upon giving a good and sufficient bond in the penal sum of $250 as security for costs, and a good and sufficient bond in the further penal sum of $5000 no/100, conditioned that said defendant shall prosecute his appeal to effect, and if he fail to make his plea good, shall render himself in execution of the sentence of imprisonment, and otherwise answer all damages, except as hereinafter provided, to wit, that said bond shall not operate as a supersedeas in so far as concerns the issuance of execution to collect the fine imposed herein upon said defendant, unless a further proper supersedeas bond be given for that purpose.

Dated: This 28th day of July, 1933.

Geo. Cosgrave
United States District Judge.

[Endorsed]: Filed Jul 28 1933 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk

[Title of Court and Cause.]

ORDER ALLOWING APPEAL AND FIXING BONDS OF FRED SHINGLE, DEFENDANT.

Upon motion of Fred Shingle, through his attorneys, upon the filing of the petition for appeal from the verdict, judgment and sentence entered herein against the said Fred Shingle, together with assignments of error filed herein, it is hereby

ORDERED, that an appeal be and it is hereby allowed the defendant, Fred Shingle, to have reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, the verdict, judgment, sentence and orders rendered and entered herein against the said defendant, Fred Shingle; and it is further

ORDERED, that pending said appeal, said defendant be released from custody on bail upon giving a good and sufficient bond in the penal sum of $250 as security for costs, and a good and sufficient bond in the further penal sum of $5000, conditioned that said defendant shall prosecute his appeal to effect, and if he fail to make his plea good, shall render himself in execution of the sentence of imprisonment, and otherwise answer all damages, except as hereinafter provided, to wit, that said bond shall not operate as a supersedeas in so far as concerns the issuance of execution to collect the fine imposed herein upon said defendant, unless a further proper supersedeas bond be given for that purpose.

Dated: This 28th day of July, 1933.

Geo. Cosgrave
United States District Judge.

[Endorsed]: Filed Jul 28 1933 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk

[TITLE OF COURT AND CAUSE.]

ORDER ALLOWING APPEAL

On motion of defendant JOHN McKEON, he having filed his petition for appeal in due form, accompanied by an assignment of errors, an appeal is granted to him from the judgment and sentence of the above entitled Court to the United States Circuit Court of Appeals, for the Ninth Circuit.

IT IS FURTHER ORDERED: That said appeal be, and the same is hereby made, a supersedeas and that said defendant be released on bail, pending the final disposition of said appeal, upon the filing of a bail bond herein in the sum of $5000.00 with good and sufficient sureties to be approved by this Court, together with a cost bond in the penal sum of $250.00, conditioned as provided by law; that said bond shall not act as a supersedeas in so far as concerns the issuance of executions to collect the fine imposed, unless proper supersedeas bonds be given for that purpose.

Dated at Los Angeles, California, this 28th day of July, 1933.

Geo. Cosgrave
Judge

[Endorsed]: Filed Jul 28 1933 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk

[Title of Court and Cause.]

ORDER ALLOWING APPEAL

On motion of defendant ROBERT S. McKEON, he having filed his petition for appeal in due form, accompanied by an assignment of errors, an appeal is granted to him from the judgment and sentence of the above entitled Court to the United States Circuit Court of Appeals, for the Ninth Circuit.

IT IS FURTHER ORDERED: That said appeal be, and the same is hereby made, a supersedeas and that said defendant be released on bail, pending the final disposition of said appeal, upon the filing of a bail bond herein in the sum of $5000.00 with good and sufficient sureties to be approved by this Court, together with a cost bond in the penal sum of $250.00, conditioned as provided by law; that said bond shall not act as a supersedeas in so far as concerns the issuance of executions to collect the fine imposed, unless proper supersedeas bonds be given for that purpose.

Dated at Los Angeles, California, this 28th day of July, 1933.

Geo. Cosgrave
Judge

[Endorsed]: Filed Jul 28 1933 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk

[Title of Court and Cause.]

ORDER ALLOWING APPEAL

Comes now the petitioner, E. BYRON SIENS by his attorney and on motion of the defendant, and upon filing his petition for an appeal and an Assignment of Error, it is ordered that an appeal be and hereby is allowed said defendant, to be reviewed in the United States Circuit Court of Appeals, the Judgment and sentence this day entered.

It is hereby further ordered that the amount of the bond on the Appeal of said defendant be and it hereby is fixed at the sum of Fifteen Thousand Dollars, said Bond to act as a supercedeas; and that where Bond shall have been given in the above specified amount, the defendant, E. BYRON SIENS, shall be enlarged and shall remain at liberty. Such Bond shall not operate as a supercedeas insofar as concerns the issuance of execution to collect the fine imposed, unless a proper supercedeas Bond is given for that purpose, until said Appeal shall be finally disposed of.

Dated this 28th day of July, 1933.

Geo. Cosgrave
Judge.

[Endorsed]: Filed Jul 28 1933 R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk

[Title of Court and Cause.]

ORDER ALLOWING APPEAL

Comes now the petitioner, WILLIAM J. CAVANAUGH by his attorney and on motion of the defendant, and upon filing his petition for an appeal and an Assignment of Error, it is ordered that an appeal be and hereby is allowed said defendant, to be reviewed in the United States Circuit Court of Appeals, the Judgment and sentence this day entered.

It is hereby further ordered that the amount of the bond on the Appeal of said defendant be and it hereby is fixed at the sum of Five Thousand Dollars, said Bond to act as a supercedeas; and that where Bond shall have been given in the above specified amount, the defendant, WILLIAM J. CAVANAUGH, shall be enlarged and shall remain at liberty. Such Bond shall not operate as a supercedeas insofar as concerns the issuance of execution to collect the fine imposed, unless a proper supercedeas Bond is given for that purpose, until said Appeal shall be finally disposed of.

Dated this 28th day of July, 1933.

Geo. Cosgrave

Judge.

[Endorsed]: Filed Jul 28 1933 R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk.

[Title of Court and Cause.]

ORDER ALLOWING APPEAL

Comes now the petitioner, ALFRED G. WILKES by his attorney and on motion of the defendant, and upon filing his petition for an appeal and an Assignment of Error, it is ordered that an appeal be and hereby is allowed said defendant, to be reveiwed in the United States Circuit Court of Appeals, the Judgment and sentence this day entered.

It is hereby further ordered that the amount of the bond on the Appeal of said defendant be and it hereby is fixed at the sum of Twenty Thousand Dollars, said Bond to act as a supercedeas,; and that where Bond shall have been given in the above specified amount, the defendant, ALFRED G. WILKES, shall be enlarged and shall remain at liberty. Such Bond shall not operate as a supercedeas insofar as concerns the issuance of execution to collect the fine imposed, unless a proper supercedeas Bond is given for that purpose, until said Appeal shall be finally disposed of.

Dated this 28th day of July, 1933.

Geo. Cosgrave

Judge.

[Endorsed]: Filed Jul 28 1933 R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk

[TITLE OF COURT AND CAUSE.]

STIPULATION

IT IS HEREBY STIPULATED by and between counsel for the parties hereto, through their respective counsel, that such of the original exhibits in this cause as are not contained in detail in the Bill of Exceptions herein, may be certified by the Clerk of the United States District Court for the Southern District of California to the United States Circuit Court of Appeals for the Ninth Judicial Circuit as a part of the evidence in the above entitled cause; and that counsel for the respective parties herein shall designate to the Clerk of the said District Court the exhibits to be certified by him to the United States Circuit Court of Appeals.

Dated: This 14th day of Dec. 1933.

PIERSON M. HALL,
United States Attorney,

By Gwyn S. Redwine
Special Assistant to the Attorney General

A. G. Divet
(A. G. Divet)
Neil S. McCarthy
(Neil S. McCarthy)
A. L. Abrahams
(A. L. Abrahams)

Attorneys for John McKeon and Robert S. McKeon.

Maurice C. Myers
(Maurice C. Myers)
in Propria Persona

Buel R. Wood
(Buel*l* R. Wood)
Attorney for Alfred G. Wilkes, E. Byron Siens and William J. Cavanaugh

H. L. Carnahan
(H. L. Carnahan)
W. E. Simpson
(W. E. Simpson)
J. E. Simpson
(J. E. Simpson)
Attorneys for Fred Shingle and Horace J. Brown.

[Endorsed]: Filed Dec 22 1933 R. S. Zimmerman, Clerk By Thomas Madden, Deputy Clerk

[Title of Court and Cause.]

ORDER

IT IS HEREBY ORDERED that such of the exhibits mentioned in the bill of exceptions filed herein that counsel for the respective parties herein find impracticable to incorporate in the said bill of exceptions may be certified to the United States Circuit Court of Appeals for the Ninth Judicial Circuit as a part of said bill of exceptions, and the Clerk of this court be and he hereby is directed to certify to the United States Circuit Court of Appeals for the Ninth Circuit all such original exhibits herein which are not incorporated in said bill of exceptions as a specific part thereof, the said exhibits to be designated by the counsel for the respective parties herein.

DATED: December 22, 1933.

Geo. Cosgrave
United States District Judge

[Endorsed]: Filed Dec 22 1933 R. S. Zimmerman, Clerk By Thomas Madden, Deputy Clerk

[TITLE OF COURT AND CAUSE.]

APPEAL BOND

KNOW ALL MEN BY THESE PRESENTS:

That we, ALFRED G. WILKES as principal, and United States Fidelity and Guaranty Company a Maryland Corporation as surety, are held and firmly bound unto the United States of America, in the full, just and penal sum of Twenty Thousand and no/100 Dollars, to be paid to the United States of America, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators.

Dated this 28th day of July, A. D. 1933.

WHEREAS, at the July term of the aforesaid Court and on the 28th day of July, 1933, in a suit pending in said court between the United States of America, as Plaintiff, and the said ALFRED G. WILKES as Defendant, a judgment and sentence was rendered against the said ALFRED G. WILKES and the said defendant, ALFRED G. WILKES has petitioned the said court in an appeal in said cause, to reverse judgment and sentence in said suit, and said order granting appeal has been on this 28th day of July, 1933, allowed by the court. Said appeal to be prosecuted in the Circuit Court of Appeals of the United States for the Ninth Circuit.

Now the condition of this bond and obligation is such, that if the said defendant, ALFRED G. WILKES shall

appear in person or by attorney in the United States Circuit Court of Appeals for the Ninth Circuit on this day and days as may be appointed for the hearing of said cause in said court and prosecute his said appeal and shall abide by and obey all orders made by the United States Circuit Court of Appeals in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said court may direct, if the judgment and sentence against him shall be affirmed, or if the appeal herein is dismissed;

And, if he shall appear for trial in the District Court of the United States for the Southern District of California Central Division, at Los Angeles on such day and days as may be appointed for a retrial by said District Court, and shall abide and obey all orders made by the said District Court, provided that judgment and sentence against him shall be reversed by the United States Circuit Court of Appeals for the Ninth Circuit, then the above obligations shall become null and void, otherwise to remain in full force and effect.

Witness our hands this 28th day of July, 1933.

Alfred G. Wilkes
2001 Calif St. San Francisco
Principal

United States Fidelity and Guaranty Company

By O. D. Brick,
its attorney in fact [Seal]
Surety

State of California, }
County of Los Angeles, } ss.

On this 28th day of July in the year One Thousand Nine Hundred and Thirty three, before, Agnes L. Whyte, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared O. D. Brick known to me to be the duly authorized attorney in fact of the United States Fidelity and Guaranty Company, and the same person whose name is subscribed to the within instrument as the attorney in fact of said Company, and the said O. D. Brick duly acknowledged to me that he subscribed the name of the United States Fidelity and Guaranty Company thereto as surety and his own name as Attorney in fact.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] Agnes L. Whyte

Notary Public in and for Los Angeles County, State of California.

My commission Expires Feb 26, 1937

The foregoing bond is approved.

July 28, 1933.

Geo. Cosgrave
U. S. Dist. Judge

[Endorsed]: Filed Jul 28 1933 R. S. Zimmerman, Clerk By Theodore Hocke, Deputy Clerk.

[Title of Court and Cause.]

APPEAL BOND

KNOW ALL MEN BY THESE PRESENTS:

That we, E. Byron Siens as principal, and F. D. Arrington and Joseph E. Shreve, as sureties, are held and firmly bound unto the United States of America, in the full, just and penal sum of Fifteen Thousand ($15,000.00) Dollars, to be paid to the United States of America, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators.

Dated this 28th day of July, A. D. 1933.

WHEREAS, at the July term of the aforesaid Court and on the 28th day of July, 1933, in a suit pending in said court between the United States of America, as Plaintiff, and the said E. Byron Siens as Defendant, a judgment and sentence was rendered against the said E. Byron Siens and the said defendant, E. Byron Siens has petitioned the said court in an appeal in said cause, to reverse judgment and sentence in said suit, and said order granting appeal has been on this 28th day of July, 1933, allowed by the court. Said appeal to be prosecuted in the Circuit Court of Appeals of the United States for the Ninth Circuit.

Now the condition of this bond and obligation is such, that if the said defendant, E. Byron Siens shall appear in person or by attorney in the United States Circuit Court of Appeals for the Ninth Circuit on this day and days as may be appointed for the hearing of said cause in said court and prosecute his said appeal and shall abide by

and obey all orders made by the United States Circuit Court of Appeals in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said court may direct, if the judgment and sentence against him shall be affirmed, or if the appeal herein is dismissed;

And, if he shall appear for trial in the District Court of the United States for the Southern District of California Central Division, at Los Angeles on such day and days as may be appointed for a retrial by said District Court, and shall abide and obey all orders made by the said District Court, provided that judgment and sentence against him shall be reversed by the United States Circuit Court of Appeals for the Ninth Circuit, then the above obligations shall become null and void, otherwise to remain in full force and effect.

Witness our hands this 28th day of July, 1933.

E. Byron Siens
2314 Lucerene, San Diego
Principal

F. D. Arrington
Park Hotel 5th & Apas St San Diego Calif.
Surety

Joseph E. Shreve
323 Commonwealth Bldg San Diego, Calif.
Surety

The foregoing Bond is approved July 28, 1933,

U. S. Judge.

State of California
County of Los Angeles, ss.

I F. D. Arrington Surety in the above and foregoing bond, being separately and duly sworn, for myself, state that I am a resident and freeholder within the State of California and County aforesaid, and that I am worth the amount specified in said bond over and above all my just debts and liabilities, exclusive of property exempt from execution.

F. D. Arrington

Subscribed and sworn to before me this 28th day of July, 1933.

[Seal] David B. Head
UNITED STATES COMMISSIONER

———*———

State of California,
County of Los Angeles, ss

I, Joseph E. Shreve Surety in the above and foregoing bond, being separately and duly sworn for myself, state that I am a resident and freeholder within the State of California and County aforesaid, and that I am worth the amount specified in said bond over and above all my just debts and liabilities, exclusive of property exempt from execution.

Joseph E. Shreve

Subscribed and sworn to before me this 28th day of July, 1933.

[Seal] David B. Head
UNITED STATES COMMISSIONER

[Endorsed]: Filed Jul 28 1933 R. S. Zimmerman, Clerk By Theodore Hocke, Deputy Clerk

[Title of Court and Cause.]

APPEAL BOND

KNOW ALL MEN BY THESE PRESENTS:

That we, WILLIAM J. CAVANAUGH as Principal, and Paul F. Travis, and Gladys K. Travis and Mary McNamara, as sureties, are held and firmly bound unto the United States of America, in the full, just and penal sum of Five Thousand $5,000.00 Dollars, to be paid to the United States of America, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators.

Dated this 28th day of July, A. D. 1933.

WHEREAS, at the July term of the aforesaid Court and on the 28th day of July, 1933, in a suit pending in said court between the United States of America, as Plaintiff, and the said William J. Cavanaugh as Defendant, a judgment and sentence was rendered against the said William J. Cavanaugh and the said defendant, William J. Cavanaugh has petitioned the said court in an appeal in said cause, to reverse judgment and sentence in said suit, and said order granting appeal has been on this 28th day of July, 1933, allowed by the court. Said appeal to be prosecuted in the Circuit Court of Appeals of the United States for the Ninth Circuit.

Now the condition of this bond and obligation is such, that if the said defendant, William J. Cavanaugh shall appear in person or by attorney in the United States Circuit Court of Appeals for the Ninth Circuit on this day and days as may be appointed for the hearing of said cause in said court and prosecute his said appeal and shall abide by and obey all orders made by the United States

Circuit Court of Appeals in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said court may direct, if the judgment and sentence against him shall be affirmed, or if the appeal herein is dismissed;

And, if he shall appear for trial in the District Court of the United States for the Southern District of California Central Division, at Los Angeles on such day and days as may be appointed for a retrial by said District Court, and shall abide and obey all orders made by the said District Court, provided that judgment and sentence against him shall be reversed by the United States Circuit Court of Appeals for the Ninth Circuit, then the above obligations shall become null and void, otherwise to remain in full force and effect.

Witness our hands this 28th day of July, 1933.

William J. Cavanaugh
1428 Alvarado, Burlingame, Calif.,
Principal

Paul F. Travis
300 N. Las Palmas—L. A.
Surety

Mary McNamara
305 So. Maple Dr. Beverly Hills Calif.
Surety

Gladys K. Travis
300 No. Las Palmas

The above and foregoing Bond is hereby approved July 28, 1933

Geo Cosgrave
U. S. District Judge

State of California
County of Los Angeles, ss.

I Paul F. Travis Surety in the above and foregoing bond, being separately and duly sworn, for myself, state that I am a resident and freeholder within the State of California and County aforesaid, and that I am worth the amount specified in said bond over and above all my just debts and liabilities, exclusive of property exempt from execution.

Paul F. Travis

Subscribed and sworn to before me this 28th day of July, 1933.

[Seal] David B. Head
UNITED STATES COMMISSIONER

———*———

State of California,
County of Los Angeles, ss

I, Mary McNamara Surety in the above and foregoing bond, being separately and duly sworn for myself, state that I am a resident and freeholder within the State of California and County aforesaid, and that I am worth the amount specified in said bond over and above all my just debts and liabilities, exclusive of property exempt from execution.

Mary McNamara

Subscribed and sworn to before me this 28th day of July, 1933.

[Seal] David B. Head
UNITED STATES COMMISSIONER

[Endorsed]: Filed Jul 28 1933 R. S. Zimmerman, Clerk By Theodore Hocke, Deputy Clerk

[Title of Court and Cause.]

Supersedeas Bond on Appeal of Horace J. Brown

KNOW ALL MEN BY THESE PRESENTS:

That we, Horace J. Brown, as principal, and Fidelity and Deposit Company of Maryland, a Maryland corporation, as surety, are held and firmly bound unto the United States of America in the full and just sum of Five Thousand Dollars, to be paid to said obligee, for the payment of which said sum well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 28th day of July, 1933.

The condition of the foregoing obligation is such that, WHEREAS, on the 28th day of July, 1933, the said principal, by a judgment and sentence, made and entered the said day, by the District Court of the United States of America, for the Southern District of California, Central Division, in the above entitled action, then pending therein, was adjudged guilty of a violation of Section 215 of the Federal Penal Code, as charged in and by the twelfth count of an indictment filed in said Court December 4, 1931, and was sentenced to pay a fine and to be imprisoned as more particularly recited and provided in and by said judgment and sentence, to which said judgment and sentence reference is hereby made; and

WHEREAS, upon the petition of said principal, it was duly ordered by said Court that an appeal be and it was allowed said principal, to have the verdict, judgment, sen-

tence and orders rendered in said action against said principal reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, and that pending said appeal, said principal should be released from custody on bail upon giving a good and sufficient bond in the penal sum of $250 as security for costs, and a good and sufficient bond in the further penal sum of $5000.00, conditioned that said principal should prosecute his appeal to effect, and if he should fail to make his plea good, should render himself in execution of the sentence of imprisonment, and otherwise answer all damages except as hereinafter provided, to wit, that such bond should not operate as a supersedeas in so far as concerns the issuance of execution to collect the said fine so imposed upon the said principal, unless a further proper supersedeas bond be given for that purpose; and

WHEREAS, said principal has given a good and sufficient bond in the penal sum of $250 as security for costs;

NOW, THEREFORE, if said principal shall prosecute his appeal to effect, and if he fail to make his plea good, shall render himself in execution of said sentence of imprisonment and otherwise answer all damages except as hereinafter provided, to wit, that this bond shall not operate as a supersedeas in so far as concerns the issuance of execution to collect the said fine so imposed upon said principal, unless a further proper supersedeas bond be given for that purpose, then this obligation shall be void; otherwise, to remain in full force and virtue.

Horace J. Brown

Principal

Fidelity and Deposit Company of Maryland, Surety

[Seal] By D. M. Ladd

Attorney-in-fact.

Attest: Robert Hecht, Agent

STATE OF CALIFORNIA)
) ss:
County of Los Angeles)

On this 28th day of July, 1933, before me Theresa Fitzgibbons, a Notary Public, in and for the County and State aforesaid, duly commissioned and sworn, personally appeared D. M. Ladd and Robert Hecht known to me to be the persons whose names are subscribed to the foregoing instrument as the Attorney-in-Fact and Agent respectively of the Fidelity and Deposit Company of Maryland, and acknowledged to me that they subscribed the name of Fidelity and Deposit Company of Maryland thereto as Principal and their own names as Attorney-in-Fact and Agent, respectively.

[Seal] Theresa Fitzgibbons
Notary Public in and for the State of California, County of Los Angeles.

Examined and recommended for approval as provided in Rule 28.

H. L. Carnahan
J. E. Simpson
W. E. Simpson,
Attorneys

I hereby approve the foregoing bond.
Dated the 28 day of July, 1933.

Geo. Cosgrave
United States District Judge

[Endorsed]: Filed Jul 28 1933 R. S. Zimmerman, Clerk By Theodore Hocke, Deputy Clerk

[TITLE OF COURT AND CAUSE.]

Supersedeas Bond on Appeal of Fred Shingle

KNOW ALL MEN BY THESE PRESENTS:

That we, FRED SHINGLE as principal, and Fidelity and Deposit Company of Maryland, a Maryland corporation, as surety, are held and firmly bound unto the United States of America in the full and just sum of Five Thousand Dollars, to be paid to said obligee, for the payment of which said sum well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 28th day of July, 1933.

The condition of the foregoing obligation is such that, WHEREAS, on the 28th day of July, 1933, the said principal, by a judgment and sentence, made and entered the said day, by the District Court of the United States of America, for the Southern District of California, Central Division, in the above entitled action, then pending therein, was adjudged guilty of a violation of Section 215 of the Federal Penal Code, as charged in and by the twelfth count of an indictment filed in said Court December 4, 1931, and was sentenced to pay a fine and to be imprisoned as more particularly recited and provided in and by said judgment and sentence, to which said judgment and sentence reference is hereby made; and

WHEREAS, upon the petition of said principal, it was duly ordered by said Court that an appeal be and it was allowed said principal, to have the verdict, judgment, sentence and orders rendered in said action against said principal reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, and that pending said

appeal, said principal should be released from custody on bail upon giving a good and sufficient bond in the penal sum of $250 as security for costs, and a good and sufficient bond in the further penal sum of $5000.00, conditioned that said principal should prosecute his appeal to effect, and if he should fail to make his plea good, should render himself in execution of the sentence of imprisonment, and otherwise answer all damages except as hereinafter provided, to wit, that such bond should not operate as a supersedeas in so far as concerns the issuance of execution to collect the said fine so imposed upon the said principal, unless a further proper supersedeas bond be given for that purpose; and

WHEREAS, said principal has given a good and sufficient bond in the penal sum of $250 as security for costs;

NOW, THEREFORE, if said principal shall prosecute his appeal to effect, and if he fail to make his plea good, shall render himself in execution of said sentence of imprisonment and otherwise answer all damages except as hereinafter provided, to wit, that this bond shall not operate as a supersedeas in so far as concerns the issuance of execution to collect the said fine so imposed upon said principal, unless a further proper supersedeas bond be given for that purpose, then this obligation shall be void; otherwise, to remain in full force and virtue.

Fred Shingle

Principal

Fidelity and Deposit Company of Maryland, Surety

[Seal] By D. M. Ladd

Attorney-in-fact.

Attest: Robert Hecht, Agent

STATE OF CALIFORNIA)
) ss:
County of Los Angeles)

On this 28th day of July, 1933, before me Theresa Fitzgibbons, a Notary Public, in and for the County and State aforesaid, duly commissioned and sworn, personally appeared D. M. Ladd and Robert Hecht known to me to be the persons whose names are subscribed to the foregoing instrument as the Attorney-in-Fact and Agent respectively of the Fidelity and Deposit Company of Maryland, and acknowledged to me that they subscribed the name of Fidelity and Deposit Company of Maryland thereto as Principal and their own names as Attorney-in-Fact and Agent, respectively.

[Seal] Theresa Fitzgibbons
Notary Public in and for the State of California, County of Los Angeles.

Examined and recommended for approval as provided in Rule 28.

H. L. Carnahan
J. E. Simpson
W. E. Simpson,
Attorneys

I hereby approve the foregoing bond.
Dated the 28th day of July, 1933.

Geo. Cosgrave
United States District Judge

[Endorsed]: Filed Jul 28 1933 R. S. Zimmerman, Clerk By Theodore Hocke, Deputy Clerk

[TITLE OF COURT AND CAUSE.]

BOND PENDING DECISION ON APPEAL

KNOW ALL MEN BY THESE PRESENTS, that ROBERT S. McKEON, as principal, and JOHN J. DOYLE and L. T. McCUTCHEON as sureties, are jointly and severally held and firmly bound *under* the United States of America in the sum of Five Thousand Dollars ($5000.00), for the payment of which sum we, and each of us, bind ourselves, our heirs, executors, administrators and assigns, this 28th day of July, 1933.

WHEREAS, lately, to-wit, on or about the 28th day of July, 1933, at a term of the District Court of the United States, in and for the Southern District of California, Central Division, in an action pending in said Court between United States of America, plaintiff, and Robert S. McKeon, defendant, judgment and sentence was made, given, rendered and entered against the said Robert S. McKeon in the above entitled action, wherein he was convicted and adjudged guilty on Count 15 of said indictment of the violation of Section 37 of the Penal Code of the United States; and

WHEREAS, the said Robert S. McKeon was by said judgment sentenced to imprisonment for one years on said Count of said indictment, and to pay a fine of Five Thousand Dollars ($5000) on said Count; and

WHEREAS, the said Robert S. McKeon has obtained an appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, to reverse said judgment and sentence, and a citation directed to the United States of America to be and appear in said United States Circuit Court of Appeals, for the Ninth Circuit, at San Francisco, California, in pursuance of the terms and at the time fixed in said citation; and

WHEREAS, the said Robert S. McKeon has been admitted to bail, pending the decision upon said appeal, in the sum of Five Thousand Dollars ($5000.00),

NOW, THEREFORE, the conditions of the above obligation are such that if the said Robert S. McKeon shall appear either in person or by his attorney in the United States Circuit Court of Appeals, for the Ninth Circuit, on such day or days as may be appointed for the hearing of such cause in said Court, and prosecute his appeal, and if the said Robert S. McKeon shall abide by and obey all orders made by the United States Circuit Court of Appeals, for the Ninth Circuit, in said cause; and if the said Robert S. McKeon shall surrender himself in execution of said judgment and sentence in the event the said judgment and sentence be affirmed by said United States Circuit Court of Appeals, for the Ninth Circuit; and if the said Robert S. McKeon shall appear for trial in the District Court of the United States, in and for the Southern District of California,

Central Division, on such day or days as may be appointed for the re-trial by said District Court, in the event the said judgment and sentence against him be reversed by the United States Circuit Court of Appeals for the Ninth Circuit.

THEN THIS OBLIGATION TO BE VOID; otherwise to remain in FULL FORCE, VIRTUE AND EFFECT.

Robert S. McKeon
Principal

J. J. Doyle
Address 650 So. Spring,
California

L. T. McCutcheon
Address 301 So. Occidental Blvd.
L. A., California.

Approved as to form:

P. V. Davis
Asst United States Attorneys

Examined and recommended for approval as provided by Rule 28:

A. L. Abrahams
Attorneys for John McKeon

Approvel this 28th day of July, 1933

Geo. Cosgrave
Judge, United States District Court.

UNITED STATES OF AMERICA)
SOUTHERN DISTRICT OF CALIFORNIA)
STATE OF CALIFORNIA) SS
COUNTY OF LOS ANGELES)

JOHN J. DOYLE of Los Angeles, California, and L. T. McCUTCHEON of Los Angeles, California being duly sworn, each for himself deposes and says:

That he is a householder in the District aforesaid, and is worth the sum of Ten Thousand Dollars ($10000.00), over and above all debts and liabilities, exclusive of property exempt from execution, and is the owner of the property listed below under Schedule of Assets, which schedule is made a part of this affidavit; that the said property is not encumbered, except as below listed, and that the property is reasonably of the value below listed, and further that he is not receiving or accepting compensation for acting as surety herein and is not surety upon any outstanding penal bonds, except as disclosed in the schedule below.

J. J. Doyle
L. T. McCutcheon

Subscribed and sworn to before me this 28th day of July 1933.

[Seal] David B. Head
United States Commissioner

[Endorsed]: Filed Jul 28 1933 R. S. Zimmerman, Clerk By Theodore Hocke, Deputy Clerk

[Title of Court and Cause.]

BOND PENDING DECISION ON APPEAL

KNOW ALL MEN BY THESE PRESENTS, that JOHN McKEON, as principal, and GEO. W. WALKER and W. D. WILSON as sureties, are jointly and severally held and firmly bound *under* the United States of America in the sum of Five Thousand Dollars ($5000.00), for the payment of which sum we, and each of us, bind ourselves, our heirs, executors, administrators and assigns, this 28th day of July, 1933.

WHEREAS, lately, to-wit, on or about the 28th day of July, 1933, at a term of the District Court of the United States, in and for the Southern District of California, Central Division, in an action pending in said Court between United States of America, plaintiff, and John McKeon, defendant, judgment and sentence was made, given, rendered and entered against the said John McKeon in the above entitled action, wherein he was convicted and adjudged guilty on Count 15 of said indictment of the violation of Section 37 of the Penal Code of the United States; and

WHEREAS, the said John McKeon was by said judgment sentenced to imprisonment for two years on said Count of said indictment, and to pay a fine of Five Thousand Dollars ($5000.00) on said Count; and

WHEREAS, the said John McKeon has obtained an appeal to the United States Circuit Court of Appeals,

for the Ninth Circuit, to reverse said judgment and sentence, and a citation directed to the United States of America to be and appear in said United States Circuit Court of Appeals, for the Ninth Circuit, at San Francisco, California, in pursuance of the terms and at the time fixed in said citation; and

WHEREAS, the said John McKeon has been admitted to bail, pending the decision upon said appeal, in the sum of Five Thousand Dollars ($5000.00),

NOW, THEREFORE, the conditions of the above obligation are such that if the said John McKeon shall appear either in person or by his attorney in the United States Circuit Court of Appeals, for the Ninth Circuit, on such day or days as may be appointed for the hearing of such cause in said Court, and prosecute his appeal, and if the said John McKeon shall abide by and obey all orders made by the United States Circuit Court of Appeals, for the Ninth Circuit, in said cause; and if the said John McKeon shall surrender himself in execution of said judgment and sentence in the event the said judgment and sentence be affirmed by said United States Circuit Court of Appeals, for the Ninth Circuit; and if the said John McKeon shall appear for trial in the District Court of the United States, in and for the Southern District of California, Central Division, on such day or days as may be appointed for the re-trial by said District Court, in the event the said judgment and sentence against

him be reversed by the United States Circuit Court of Appeals, for the Ninth Circuit.

THEN THIS OBLIGATION TO BE VOID; otherwise to remain in FULL FORCE, VIRTUE AND EFFECT.

John McKeon,
Principal
Address Petroleum Sec. Bld
L. A. California.

Geo. W. Walker
ADDRESS 109 Fremont Place
Los Angeles, California.

W. D. Wilson
Lucy Wilson
Address 1428 No. Crescent Hts.
Blvd. L. A. California

Approved as to form:

P. V. Davis
Asst United States Attorneys

Examined and recommended for approval as provided by Rule 28:

A. L. Abrahams
Attorneys for John McKeon

Approved this 28th day of July, 1933

Geo. Cosgrave
Judge, United States District Court.

UNITED STATES OF AMERICA)
SOUTHERN DISTRICT OF CALIFORNIA)
STATE OF CALIFORNIA) SS
COUNTY OF LOS ANGELES)

GEO. W. WALKER of Los Angeles, California, and W. D. WILSON of Los Angeles, California being duly sworn, each for himself deposes and says:

That he is a householder in the District aforesaid, and is worth the sum of Ten Thousand Dollars ($10000.00), over and above all debts and liabilities, exclusive of property exempt from execution, and is the owner of the property listed below under Schedule of Assets, which schedule is made a part of this affidavit; that the said property is not encumbered, except as below listed, and that the property is reasonably of the value below listed, and

further that he is not receiving or accepting compensation for acting as surety herein and is not surety upon any outstanding penal bonds, except as disclosed in the schedule below.

Geo. W. Walker
W. D. Wilson

Subscribed and sworn to before me this 28th day of July 1933.

[Seal] David B. Head
United States Commissioner

[Endorsed]: Filed Jul 28 1933 R. S. Zimmerman, Clerk By Theodore Hocke, Deputy Clerk

[TITLE OF COURT AND CAUSE.]

SUPERCEDEAS BOND OF THE DEFENDANT MAURICE C. MYERS.

KNOW ALL MEN BY THESE PRESENTS:

That we, Maurice C. Myers as principal, and E. B. Campbell and A. W. Smith, and William T. Nunn, Jr., as sureties, are held and firmly bound unto the United States of America, in the sum of Five Thousand Dollars, ($5000.00), to the payment of which, well and truly to be made, we jointly and several bind ourselves, our executors and administrators, firmly by these presents.

WITNESS our hands and seals at Los Angeles, in said District this 28th day of July, 1933.

The conditions of the above obligation are such that, whereas an indictment was filed against Maurice C. Myers, charging him with a violation of Section #215 of the Penal Code of the United States, and that thereafter, on the 28th day of July, 1933, he was convicted of said offence and sentenced by said Court to a term of imprisonment; and whereas thereafter, a petition was filed by the said Maurice C. Myers for an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and an order allowing said appeal was made, and pending said

appeal the Court made an order fixing bail in the sum of Five Thousand Dollars;

NOW THEREFORE, if the said Maurice C. Myers shall appear and render himself amenable to any and all lawful orders and process in the premises; and if said judgment of conviction be affirmed, or said appeal be dismissed and not be prosecuted, and said Maurice C. Myers renders himself amenable to said judgment of conviction and renders himself in execution, then this recognizance be void, otherwise to remain in full force and effect.

Maurice C. Myers [Seal]
E. B. Campbell [Seal]
Wm. T. Nunn, Jr. [Seal]
Maj. A. W. Smith M. C.
U. S. Army.

SOUTHERN DISTRICT OF CALIFORNIA, SS:

E. B. Campbell deposes and says: That he is a householder in said District, and is worth the sum of Five thousand dollars – and owns – Lots 4, 5 and 6 Tract 236 L. A. County – value $21,000 – encumbrances – $5000 2 Portions of North Estate sub – No. 1 – Big Bear – San Bernardino Co – value 10,000 – unencumbered (commu-

nity) exclusive of property free from execution, and over and above all debts and liabilities.

E. B. Campbell
1101 Pac. So. West Bk.
Bldg Long Beach
Maj. A. W. Smith
Maj M C U. S. Army

Subscribed and sworn to before me this 29th day of July, A. D. 1933.

[Seal] David B. Head
United States Commissioner for the Southern District of California, Central Division.

The form of the foregoing bond and the sufficiency of the sureties thereto are hereby approved.

Mack Meader
Attorney for appellant, Maurice C. Myers.

APPROVED: JUL 28 1933

Geo. Cosgrave
Judge.

[Endorsed]: Filed Jul 28 1933 R. S. Zimmerman, Clerk By J. M. Horn, Deputy Clerk

[Title of Court and Cause.]

Cost Bond on Appeal of Horace J. Brown

KNOW ALL MEN BY THESE PRESENTS:

That we, Horace J. Brown, as principal, and Fidelity and Deposit Company of Maryland, a Maryland corporation, as surety, are held and firmly bound unto the United States of America in the full and just sum of Two Hundred Fifty Dollars, to be paid to said obligee, for the payment of which said sum well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 28th day of July, 1933.

The condition of the foregoing obligation is such that,

WHEREAS, on the 28th day of July, 1933, the said principal, by a judgment and sentence, made and entered the said day, by the District Court of the United States of America, for the Southern District of California, Central Division, in the above entitled action, then pending therein, was adjudged guilty of a violation of Section 215 of the Federal Penal Code, as charged in and by the twelfth count of an indictment filed in said Court December 4, 1931, and was sentenced to pay a fine and to be imprisoned as more particularly recited and provided in

and by said judgment and sentence, to which said judgment and sentence reference is hereby made; and

WHEREAS, upon the petition of said principal, it was duly ordered by said Court the 28th day of July, 1933, that an appeal be and it was allowed said principal, to have reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, the verdict, judgment, sentence and orders rendered and entered in said action against the said principal, and that pending said appeal, said principal should be released from custody on bail upon giving a good and sufficient bond in the penal sum of Two Hundred Fifty Dollars as security for costs, and a good and sufficient bond in the further penal sum of five thousand, Dollars, conditioned as therein provided;

NOW, THEREFORE, if said principal shall prosecute his appeal to effect, and if he fail to make his plea good, shall answer all costs, then this obligation shall be void; otherwise, to remain in full force and virtue.

Horace J. Brown

Principal

Fidelity and Deposit Company of Maryland, Surety,

[Seal] By D. M. Ladd,

Attorney-in-fact

Attest Robert Hecht, Agent

STATE OF CALIFORNIA)
) ss:
County of Los Angeles)

On this 28th day of July, 1933, before me Theresa Fitzgibbons, a Notary Public, in and for the County and State aforesaid, duly commissioned and sworn, personally appeared D. M. Ladd and Robert Hecht known to me to be the persons whose names are subscribed to the foregoing instrument as the Attorney-in-Fact and Agent respectively of the Fidelity and Deposit Company of Maryland, and acknowledged to me that they subscribed the name of Fidelity and Deposit Company of Maryland thereto as Principal and their own names as Attorney-in-Fact and Agent, respectively.

[Seal] Theresa Fitzgibbons

Notary Public in and for the State of California, County of Los Angeles.

Examined and recommended for approval as provided in Rule 28.

H. L. Carnahan
J. E. Simpson
W. E. Simpson,
Attorneys

I hereby approve the foregoing bond.

Dated the 28 day of July, 1933.

Geo. Cosgrave
United States District Judge

[Endorsed]: Filed Jul 28 1933 R. S. Zimmerman, Clerk By Theodore Hocke, Deputy Clerk

[Title of Court and Cause.]

Cost Bond on Appeal of Fred Shingle

KNOW ALL MEN BY THE PRESENTS:

That we, Fred Shingle, as principal, and Fidelity and Deposit Company of Maryland, a Maryland corporation, as surety, are held and firmly bound unto the United States of America in the full and just sum of Two Hundred Fifty Dollars, to be paid to said obligee, for the payment of which said sum well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 28th day of July, 1933.

The condition of the foregoing obligation is such that,

WHEREAS, on the 28th day of July, 1933, the said principal, by a judgment and sentence, made and entered the said day, by the District Court of the United States of America, for the Southern District of California, Central Division, in the above entitled action, then pending therein, was adjudged guilty of a violation of Section 215 of the Federal Penal Code, as charged in and by the twelfth count of an indictment filed in said Court December 4, 1931, and was sentenced to pay a fine and to be imprisoned as more particularly recited and provided in

and by said judgment and sentence, to which said judgment and sentence reference is hereby made; and

WHEREAS, upon the petition of said principal, it was duly ordered by said Court the 28th day of July, 1933, that an appeal be and it was allowed said principal, to have reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, the verdict, judgment, sentence and orders rendered and entered in said action against the said principal, and that pending said appeal, said principal should be released from custody on bail upon giving a good and sufficient bond in the penal sum of Two Hundred Fifty Dollars as security for costs, and a good and sufficient bond in the further penal sum of five thousand Dollars, conditioned as therein provided;

NOW, THEREFORE, if said principal shall prosecute his appeal to effect, and if he fail to make his plea good, shall answer all costs, then this obligation shall be void; otherwise, to remain in full force and virtue.

Fred Shingle

Principal

Fidelity and Deposit Company of Maryland, Surety,

[Seal] By D. M. Ladd,

Attorney-in-fact

Attest Robert Hecht, Agent

STATE OF CALIFORNIA)
) ss:
County of Los Angeles)

On this 28th day of July, 1933, before me Theresa Fitzgibbons, a Notary Public, in and for the County and State aforesaid, duly commissioned and sworn, personally appeared D. M. Ladd and Robert Hecht known to me to be the persons whose names are subscribed to the foregoing instrument as the Attorney-in-Fact and Agent respectively of the Fidelity and Deposit Company of Maryland, and acknowledged to me that they subscribed the name of Fidelity and Deposit Company of Maryland thereto as Principal and their own names as Attorney-in-Fact and Agent, respectively.

[Seal] Theresa Fitzgibbons
Notary Public in and for the State of California, County of Los Angeles.

Examined and recommended for approval as provided in Rule 28.

H. L. Carnahan
J. E. Simpson
W. E. Simpson,
Attorneys

I hereby approve the foregoing bond.

Dated the 28 day of July, 1933.

Geo. Cosgrave
United States District Judge

[Endorsed]: Filed Jul 28 1933 R. S. Zimmerman, Clerk By Theodore Hocke, Deputy Clerk

[Title of Court and Cause.]

BOND FOR COSTS ON APPEAL

KNOW ALL MEN BY THESE PRESENTS, that we, ROBERT S. McKEON, as principal, and JOHN J. DOYLE and L. T. McCUTCHEON, as sureties, are held and firmly bound unto the United States of America in the full and just sum of Two Hundred Fifty Dollars ($250.00), to be paid to the said United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 28th day of July, 1933.

WHEREAS, lately at a said term of the United States District Court, in and for the Southern District of California, Central Division, in an action pending in said Court between the United States of America, plaintiff, and Robert S. McKeon, defendant, a judgment was rendered against the said Robert S. McKeon at the said term of Court and the said Robert S. McKeon has petitioned for and been allowed an appeal to the United States Circuit Court of Appeals, Ninth Circuit, and a citation has been issued, directed to the United States District Attorney, for the Southern District of California, citing him to appear in the said United States Circuit Court of Appeals, Ninth Circuit, at San Francisco, California, Thirty days from and after the date of such citation.

NOW, the condition of the above obligation is such, that if the said Robert S. McKeon shall prosecute said appeal to effect and answer all costs, if he fails to make good his plea, then the obligation to be void, else to remain in full force and virtue.

Robert S. McKeon,
Principal
Address Petroleum Securities Bldg.
Los Angeles, California

J. J. Doyle
Address 650 So. Spring
Los Angeles, California

L. T. McCutcheon
Address 301 So. Occidental Blvd.
Los Angeles, California

Approved as to form:

P. V. Davis,
Asst. United States Attorney

Examined and recommended for approval as provided by Rule 28:

A. L. Abrahams
Attorneys for Robert S. McKeon

Approved this 28th day of July, 1933

Geo. Cosgrave
Judge, United States District Court.

UNITED STATES OF AMERICA
SOUTHERN DISTRICT OF CALIFORNIA)
STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES)

JOHN J. DOYLE of Los Angeles, California, and L. T. McCUTCHEON of Los Angeles, California, being duly sworn, each for himself deposes and says:

That he is a householder in the District aforesaid, and is worth the sum of Five Hundred Dollars ($500.00), over and above all debts and liabilities, exclusive of property exempe from execution, and is the owner of the property listed below under Schedule of Assets, which schedule is made a part of this affidavit; that the said property is not encumbered, except as below listed, and that the property is reasonably of the value below listed, and further that he is not receiving or accepting compensation for acting as surety herein and is not surety upon any outstanding penal bonds, except as disclosed in the schedule below.

J. J. Doyle
650 So. Spring St.

L. T. McCutcheon

Subscribed and sworn to before me this 28th day of July, 1933.

[Seal] David B. Head
UNITED STATES COMMISSIONER

[Endorsed]: Filed Jul 28, 1933 R. S. Zimmerman, Clerk By Theodore Hocke, Deputy Clerk

[TITLE OF COURT AND CAUSE.]

BOND FOR COSTS ON APPEAL

KNOW ALL MEN BY THESE PRESENTS, that we, JOHN McKEON, as principal, and GEO. W. WALKER and W. D. WILSON, as sureties, are held and firmly bound unto the United States of America in the full and just sum of Two Hundred Fifty Dollars ($250.00), to be paid to the said United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 28th day of July, 1933.

WHEREAS, lately at a said term of the United States District Court, in and for the Southern District of California, Central Division, in an action pending in said Court between the United States of America, plaintiff, and John McKeon, defendant, a judgment was rendered against the said John McKeon at the said term of Court and the said John McKeon has petitioned for and been allowed an appeal to the United States Circuit Court of Appeals, Ninth Circuit, and a citation has been issued, directed to the United States District Attorneys, for the Southern District of California, citing him to appear in the said United States Circuit Court of Appeals, Ninth Circuit, at San Francisco, California, Thirty days from and after the date of such citation.

NOW, the condition of the above obligation is such, that if the said John McKeon shall prosecute said appeal to effect and answer all costs, if he fails to make good his plea, then the obligation to be void, else to remain in full force and virtue.

John McKeon,
Principal

Address Petroleum Securities Bld.
Los Angeles, California

Geo. W. Walker
Address 109 Fremont Place
Los Angeles, California

W. D. Wilson
Lucy Wilson
Address 1428 No. Crescent
Los Angeles, California

Approved as to form:

P. V. Davis
Asst United States Attorneys

Examined and recommended for approval as provided by Rule 28:

A. L. Abrahams
Attorneys for John McKeon

Approved this 28th day of July, 1933.

Geo. Cosgrave
Judge, United States District Court

UNITED STATES OF AMERICA)
SOUTHERN DISTRICT OF CALIFORNIA)
STATE OF CALIFORNIA) SS.
COUNTY OF LOS ANGELES)

GEO. W. WALKER of Los Angeles, California, and W. D. WILSON of Los Angeles, California, being duly sworn, each for himself deposes and says:

That he is a householder in the District aforesaid, and is worth the sum of Five Hundred Dollars ($500.00), over and above all debts and liabilities, exclusive of property exempt from execution, and is the owner of the property listed below under Schedule of Assets, which schedule is made a part of this affidavit; that the said property is not encumbered, except as below listed, and that the property is reasonably of the value below listed, and further that he is not receiving or accepting compensation for acting as surety herein and is not surety upon any outstanding penal bonds, except as disclosed in the schedule below.

Geo. W. Walker
W. D. Wilson

Subscribed and sworn to before me this 28th day of July, 1933.

[Seal] David B. Head
UNITED STATES COMMISSIONER

[Endorsed]: Filed Jul 28 1933 R. S. Zimmerman, Clerk By Theodore Hocke, Deputy Clerk

10679-M

At a stated Term, to wit, the October Term, A. D. 1933 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday the twenty-sixth day of February in the year of our Lord One Thousand Nine Hundred and thirty-four.

Present:

Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding,

Honorable WILLIAM H. SAWTELLE, Circuit Judge.

Honorable FRANCIS A. GARRECHT, Circuit Judge.

ALFRED G. WILKES, et al.,	)	
	)	
Appellants,	)	
	)	
vs.	)	Undocketed
	)	
UNITED STATES OF AMERICA,	)	
	)	
Appellee.	)	

ORDER GRANTING LEAVE TO CERTAIN APPELLANTS TO PROSECUTE APPEAL IN FORMA PAUPERIS.

Upon consideration of the petition of appellants Alfred G. Wilkes, E. Byron Siens, William J. Cavanaugh and

Maurice C. Myers, for leave to prosecute appeal in forma pauperis, and of the objections thereto filed by appellee, and good cause therefor appearing, ORDERED leave granted appellants Alfred G. Wilkes, E. Byron Siens, William J. Cavanaugh and Maurice C. Myers to prosecute appeal in forma pauperis, without prepayment of fees and costs, and without depositing security therefor, and that said appellants may file typewritten brief.

I HEREBY CERTIFY that the foregoing is a full, true, and correct copy of an original Order made and entered in the within-entitled cause.

ATTEST my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this twenty-eighth day of February A. D. 1934.

[Seal] Paul P. O'Brien,
Clerk, U. S. Circuit Court of Appeals
for the Ninth *District*

[Endorsed]: Filed Mar 1 1934 R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk

[Title of Court and Cause.]

PRAECIPE

TO THE CLERK OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA:

Pursuant to the order of the United States Circuit Court of Appeals for the Ninth Circuit, dated Monday the Twenty-sixth day of February, 1934, allowing the appellants Alfred G. Wilkes, E. Byron Siens, William J. Cavanaugh and Maurice C. Myers, leave to prosecute their appeals in forma pauperis without the prepayment of fees and costs, and without depositing security thereof, please prepare transcript of record on appeal in the above entitled matter and include therein the following.

1. Minutes showing return of indictment and indictment.

2. Minutes showing arraignment and pleas of these appealing defendants.

3. Minutes showing filing of demurrers and motions for bills of particulars of these appealing defendants.

4. By reference only, those parts of the demurrers of these appealing defendants set forth in the bill of exceptions.

5. Minutes showing argument and rulings on demurrers and motions for bills of particulars and on further argument on the demurrer to the fifteenth count of the indictment.

6. Minutes showing date trial began, that the prosecution rested its case, the motions made by the defendants

at the close of the government's evidence, and at the close of all of the evidence, together with the rulings thereon, and the counts of the indictment dismissed.

7. Minutes showing the giving of the court's instructions to the jury, the retirement of the jury, the jury's request for further exhibits and instructions and the exceptions taken by the defendants to instructions.

8. The verdicts as to these appealing defendants and a statement showing that the defendants Jones, Westbrook, Raleigh B. McKeon and Howard Shores were acquitted by the jury on all counts.

9. The judgment and sentences of the court.

10. By reference only, the motion for a new trial and in arrest of judgment of these appealing defendants.

11. The bill of exceptions and the order of the court approving and allowing the same.

12. Minutes showing filing of requested instructions.

13. All orders extending the time for the filing and settling of the bill of exceptions and extending the term of court for that purpose.

14. Petitions for appeal of these appealing defendants.

15. Orders allowing appeals of these appealing defendants and citations.

16. Bonds on appeal of these appealing defendants.

17. Orders of the District Court and the United States Circuit Court of Appeals allowing the filing of amended and supplemental assignments of error and orders extending the time for the filing thereof.

18. Amended and Supplemental Assignments of Error.

19. Minutes showing filing of assignments of error, amended and supplemental assignments of error, proposed bill of exceptions, objections of United States Attorney to proposed bill of exceptions, and ruling of court overruling plaintiff's objections to proposed bill of exceptions.

20. Stipulation and order of court for certification of exhibits to the United States Circuit Court of Appeals.

21. In preparing the foregoing record eliminate the title of the court and cause and the Clerk's filing marks.

22. All other records usually and properly included in a transcript of record on appeal.

Dated March 5, 1934.

BUEL R. WOOD
Buel R. Wood
Attorney for Defendants Alfred G. Wilkes, E. Byron Siens, William J. Cavanaugh and Maurice C. Myers.

Received copy of Praecipe this 5th day of March, 1934.

*PIE*RSON M. HALL,
UNITED STATES ATTORNEY,
By Hugh L. Dickson
D. H.
Assistant United States Attorney.

[Endorsed]: Filed Mar 5 1934 R. S. Zimmerman, Clerk By Thomas Madden, Deputy Clerk.

[Title of Court and Cause.]

PRAECIPE

TO THE CLERK OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA:

Please prepare transcript of record on appeal in the above entitled matter and include therein the following:

1. Minutes showing return of indictment and indictment. In printing the indictment insert in the printed record the page and line reference in the original indictment appearing at the following places therein and print the words hereinafter set forth in quotation marks in either Italics or bold face type.

(1) Page 3, line 19, the beginning of the paragraph.

(2) Page 3, lines 19 and 20, after the words "some of the defendants".

(3) Page 3, lines 22, 23, and 24, after the words "they, the said defendants, some of whom were then and there directors and officers of said Italo Petroleum Corporation of America."

(4) Page 3. line 31 end of paragraph.

(5) Page 3, line 32 beginning of paragraph.

(6) Page 4, lines 3 and 4, after the words "some of the said defendants".

(7) Page 4, line 10, after the words "they, the said defendants".

(8) Page 4, line 15, after the word "wrongfully".

(9) Page 4, lines 14 and 15, after the words "that some of the defendants".

(10) Page 4 line 17, after the words "unlawfully".

(11) Page 4, line 17, after the words "that some of the defendants".

(12) Page 4, line 21, after the words "they, the said defendants"

(13) Page 4, line 25, the end of the paragraph.

(14) Page 4, line 26 the beginning of the paragraph.

(15) Page 4, lines 26 and 27, after the words "the defendants".

(16) Page 5, lines 6 and 7, after the words "that the defendants"; also put the words following "should and they did" in Italics or bold face type.

(17) Page 5, line 21, beginning of the paragraph.

(18) Page 5, lines 29 and 30, after the words "these said defendants".

(19) Page 5, lines 29, 30, and 31, after the words "should and they did distribute some of the said stock to themselves and to other persons".

(20) Page 6, line 1, end of paragraph.

(21) Page 6, line 4, after the words "that some of said defendants"; also put the words following "then and there should and they did become members of said syndicate" in Italics or bold face type.

(22) Page 6, lines 6 and 7, after the words "some of the defendants"

(23) Page 6, lines 12, 14 and 15, after the words "that the said defendants while acting as aforesaid and while members of said syndicate".

(24) Page 6, line 14, after the word "wrongfully".

(25) Page 6, line 22, the end of the paragraph.

(26) Page 6, line 23, the beginning of the paragraph.

(27) Page 6, lines 23 and 24, after the words "that some of the defendants".

(28) Page 6, lines 30 and 31 after the words "certain assets of the said McKeon Drilling Co. Inc."

(29) Page 7, line 1, after the words "said assets".

(3) Page 7, line 4, end of paragraph.

(31) Page 7, lines 5 and 6, after the words "some of the said defendants".

(32) Page 7, line 8, after the words "the said defendants".

(33) Page 7, line 15, after the words "they, the said defendants,"

(34) Page 7, line 17, end of paragraph.

(35) Page 7, line 18, beginning of paragraph.

(36) Page 7, lines 19 and 20, after the words "that the defendants".

(37) Page 7, line 25, end of the paragraph.

(38) Page 7, lines 26 and 27, after the words "some of the defendants".

(39) Page 7, line 32, after the words "these said defendants".

(40) Page 8, line 14, beginning of paragraph.

(41) Page 8, lines 22 to the end of the paragraph.

(42) Page 8, lines 23, 24 and 25, after the words "that the said defendants".

(43) Page 8, line 30, beginning of paragraph.

(44) Page 9, line 9, the end of paragraph.

(45) Page 9, line 10, beginning of paragraph

(47) Page 9, line 14, end of paragraph.

(48) Page 9, line 15, beginning of paragraph.

(49) Page 9, line 26, end of paragraph.

(50) Page 9, line 27, beginning of paragraph.

(51) Page 10, line 4, end of paragraph.

(52) Page 10, line 5, beginning of paragraph.

(53) Page 10, line 10, end of the paragraph.

2. Minutes showing arraignment and pleas of these appealing defendants.

3. Minutes showing filing of demurrers and motions for bills of particulars of these appealing defendants.

4. By reference only, those parts of the demurrers of these appealing defendants set forth in the bill of exceptions.

5. Minutes showing argument and rulings on demurrers and motions for bills of particulars and on further argument on the demurrer to the fifteenth count of the indictment; also minutes pertaining to the motions for a separate trial of the defendants, Shingle, Brown and Jones, and the filing of and ruling on the affidavit of personal bias and prejudice of the trial judge.

6. Minutes showing date trial began, that the prosecution rested its case, the motions made by the defendants at the close of the government's evidence, and at the close of all of the evidence, together with the rulings thereon, and the counts of the indictment dismissed.

7. Minutes showing the giving of the court's instructions to the jury, the retirement of the jury, the jury's request for further exhibits and instructions and the exceptions taken by the defendants to instructions.

8. The verdict as to these appealing defendants and a statement showing that the defendants Jones, Westbrook, Raleigh B. McKeon and Howard Shores were acquitted by the jury on all counts.

9. The judgment and sentences of the court.

10. By reference only, the motion for a new trial and in arrest of judgment of these appealing defendants.

11. The bill of exceptions and the order of the court approving and allowing the same.

12. Minutes showing filing of requested instructions.

13. All orders extending the time for the filing and settling of the bill of exceptions and extending the term of court for that purpose.

14. Petitions for appeal of these appealing defendants.

15. Orders allowing appeals of these appealing defendants and citations.

16. Bonds on appeal of these appealing defendants.

17. Orders of the District Court and the United States Circuit Court of Appeals allowing the filing of amended and supplemental assignments of error and orders extending the time for the filing thereof.

18. Amended and Supplemental Assignments of Error.

19. Minutes showing the filing of assignments of error, amended and supplemental assignments of error, proposed bill of exceptions, objections of United States Attorney to proposed bill of exceptions, and ruling of court overruling plaintiff's objections to proposed bill of exceptions.

20. Stipulation and order of court for certification of exhibits to the United States Circuit Court of Appeals.

21. In preparing the foregoing record eliminate the title of the court and cause and the clerk's filing marks.

22. All other records usually and properly included in a transcript of record on appeal.

Dated: February 20th, 1934.

A. G. DIVET,
NEIL S. McCARTHY
A. L. ABRAHAMS
Attorneys for Defendants, Robert McKeon and John McKeon.

H. L. CARNAHAN,
W. E. SIMPSON,
J. E. Simpson
J. E. SIMPSON,
Attorneys for Defendants, Fred Shingle and Horace J. Brown.

Received copy of Praecipe this 20th day of February, 1934.

PIERSON M. HALL,
UNITED STATES ATTORNEY,
By E. R. Utley D. H.
Assistant United States Attorney.

[Endorsed]: Filed Feb. 20, 1934 R. S. Zimmerman, Clerk, By Edmund L. Smith, Deputy Clerk

[TITLE OF COURT AND CAUSE.]

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 1607 pages, numbered from 1 to 1607 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation of Fred Shingle and Horace J. Brown; citation of Robert S. McKeon; citation of John McKeon; citation of Alfred G. Wilkes; citation of E. Byron Siens; citation of William J. Cavanaugh; citation of Maurice C. Myers; docket entries (as called for in the praecipes); indictment; minutes of the court (including return of indictment, pleas, verdicts, judgments, sentences, etc.); memorandum of the court; bill of exceptions and order of the court approving and allowing the same; orders extending the time for the filing and settling of the bill of exceptions and extending the term; order of the United States District Court and copy of an order of United States Circuit Court of Appeals allowing the filing of amended and supplemental assignment of errors and orders extending the time for the filing thereof; petitions for

appeal of Maurice C. Myers, Horace J. Brown, Fred Shingle, John McKeon, Robert S. McKeon, E. Byron Siens, William J. Cavanaugh and Alfred G. Wilkes; assignments of error as amended and supplemented of all of the defendants who filed petitions for appeal; orders allowing appeal of Maurice C. Myers, Horace J. Brown, Fred Shingle, John McKeon, Robert S. McKeon, E. Byron Siens, William J. Cavanaugh and Alfred G. Wilkes; stipulation re original exhibits being certified to United States Circuit Court of Appeal; order re original exhibits; appeal bonds of Alfred G. Wilkes, E. Byron Siens, William J. Cavanaugh, Horace J. Brown, Fred Shingle, Robert S. McKeon, John McKeon and Maurice C. Myers; cost bonds of Horace J. Brown, Fred Shingle, Robert S. McKeon and John McKeon; copy of order of United States Circuit Court of Appeals granting leave to certain appellants to prosecute appeal in forma pauperis, and praecipes (two) of appellants.

I DO FURTHER CERTIFY that the amount paid for printing the foregoing record on appeal is $ and that said amount has been paid the printer by the appellant herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to..... and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this..... day of April, in the year of Our Lord One Thousand Nine Hundred and Thirty-four and of our Independence the One Hundred and Fifty-eighth.

R. S. ZIMMERMAN,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By

Deputy.

No. 7466.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

Alfred G. Wilkes, E. Byron Siens, John McKeon, Robert McKeon, Maurice C. Myers, William J. Cavanaugh, Fred Shingle and Horace J. Brown,

Appellants,

vs.

United States of America,

Appellee.

BRIEF OF APPELLANTS FRED SHINGLE AND HORACE J. BROWN.

J. E. SIMPSON,
W. E. SIMPSON,
H. L. CARNAHAN,
Garfield Bldg., 403 W. 8th St., Los Angeles,
Attorneys for Appellants Fred Shingle and Horace J. Brown.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

PAGE

STATUTES.

Text Books and Encyclopedias.

No. 7466.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

Alfred G. Wilkes, E. Byron Siens, John McKeon, Robert McKeon, Maurice C. Myers, William J. Cavanaugh, Fred Shingle and Horace J. Brown,

Appellants,

vs.

United States of America,

Appellee.

BRIEF OF APPELLANTS FRED SHINGLE AND HORACE J. BROWN.

STATEMENT OF THE CASE.

Appellants, Fred Shingle and Horace J. Brown, were indicted with sixteen other persons, charged in the first fourteen counts of the indictment with the devising of a scheme and artifice to defraud and the purported use of the United States Mails for the purpose of executing such scheme in violation of Federal Penal Code Section 215 (18 U. S. C. A. 338); the fifteenth count charged a purported conspiracy "to conspire" to do the things alleged

in the first fourteen counts. The alleged scheme to defraud was pleaded in the first count of the indictment and incorporated by reference in the remaining counts. [R. 26-27.]

These appellants seasonably interposed a demurrer, both general and special, which was overruled, and a motion for a bill of particulars [R. 137-149 *et seq.*] which was granted in part and denied in part. Exceptions were noted to the adverse rulings. [R. 79 and 80.]

After entry of pleas of not guilty these appellants moved for a separate trial which was denied and exception noted. [R. 161-165.] Appellants Shingle and Brown joined in an affidavit of personal bias and prejudice of the trial judge, Honorable George Cosgrave, executed by the defendant Siens, which affidavit was overruled and denied and exception noted. [R. 166-188.]

Seventeen defendants were placed on trial, the eighteenth, R. L. Mikel, having been granted a separate trial. At the conclusion of the government's case in chief the cause was, on motion of government counsel, dismissed as to the defendants DeMaria and Lyons. [R. 686.] Appellants thereupon moved the court (1) to strike certain evidence from the record and instruct the jury to disregard it, (2) to limit certain evidence to certain defendants and instruct the jury not to consider such evidence as to other defendants, (3) to instruct the jury to return verdicts of not guilty as to each appellant as to each count for insufficiency of the evidence. [R. 681-692.] All motions

were denied and exceptions noted [R. 689 and 692] except that counts numbered one, four, five, nine and ten were dismissed for insufficient evidence and the motion for an instructed verdict granted as to the defendant Tommassini.

At the conclusion of all evidence appellants renewed the motions made at the conclusion of the government's case to strike and limit evidence and for instructed verdicts of not guilty. The motions were denied and exceptions noted. [R. 1261-1262.] The cause was submitted to the jury which, after deliberating from Thursday noon until late Sunday morning, returned its verdict finding appellants Shingle and Brown guilty on count twelve of the indictment and not guilty on all other charges. No other defendant was found guilty on count twelve. [R. 124 and 125.]

Appellants' respective motions for a new trial and in arrest of judgment were denied [R. 1359 to 1363] and they were each sentenced to serve one year in jail and fined $1000 each. From the verdict and judgment and other proceedings above stated these appeals are prosecuted.

To simplify this appeal a joint record has been filed on behalf of all appellants. In the brief of appellants McKeon is contained an analysis of the indictment and evidence which these appellants adopt. We shall only include herein such matters as are not covered in the McKeon brief and which apply to these appellants whose situation is dissimilar to that of other appellants and who were acquitted on all of the counts upon which any other appellant was convicted.

THE INDICTMENT AND BILL OF PARTICULARS.

The alleged scheme to defraud is pleaded in the first count of the indictment and incorporated by reference in the remaining counts. The scheme is divided into a number of "parts," the indictment alleging that "some of the defendants" participated in some "parts" and that "these said defendants" and "the defendants" participated in other parts. Because of the uncertainty existing as to which defendants were meant by this peculiar terminology, Judge Paul J. McCormick, before whom the case was pending before trial, granted appellants' motion and required that a bill of particulars be furnished advising appellants which of the defendants the government claimed had participated in these various "parts" of the alleged scheme.

The bill of particulars as furnished simply referred to the terminology as it appeared by page and line in the typewritten indictment. In the printed record we have printed this terminology in bold face type specifying by footnote references the page and line reference in the original indictment. [R. 29-37.] It is an arduous, painstaking and time consuming task to thumb through the record and insert in the appropriate places the names of those defendants and appellants alleged in the bill of particulars to have participated in the various "parts" of the alleged scheme and to enumerate those excluded from participation in these various "parts." To simplify this task we will divide the "parts" of the alleged scheme into four, viz: (1) the $80,000 loan syndicate, (2) the purchase of the Brownmoor assets by the Italo Petroleum Corporation of America for 600,000 units of Italo stock,

(3) the $3,500,000 or "Big Syndicate," (4) the purchase of the assets of the McKeon Drilling Company, Inc., by the Italo Petroleum Corporation of America for a cash and stock consideration. We will designate those "parts" in which the bill of particulars alleges these two appellants, Shingle and Brown, participated and those in which the bill of particulars does not specify them as having participated and will give references to the appropriate record references substantiating the statements made.

Preliminarily an important undisputed fact should be stated and kept constantly in mind by the court, and that is, that the appellants Shingle and Brown were never officers or directors of Italo-American Petroleum Corporation (herein referred to as Italo-American) *or of Italo Petroleum Corporation of America* (herein referred to as Italo) *or of the Brownmoor Oil Company* (herein referred to as Brownmoor) *or of the McKeon Drilling Co., Inc.* (herein referred to as McKeon Company).

The Indictment as Restricted by the Bill of Particulars Alleges:

1. $80,000 Loan Syndicate.

That about May 16, 1928, certain defendants, *including Shingle and Brown* [Indictment p. 3, lines 19 and 20, R. p. 29; Foot Note 2, Bill of Particulars, par. 4-a and b, R. p. 154], loaned Italo $80,000 for which they "wrongfully" received as a bonus 80,000 shares of Brownmoor stock.

2. **Brownmoor-Italo Transaction.**

That the defendants who were officers and directors of Italo, *excluding Shingle and Brown* [Indictment, R. p. 30; F. N. 6 and 7, B. P. par. 4-c and d, R. p. 154], caused Italo to contract to purchase the Brownmoor assets at an excessive consideration and caused Italo to issue 600,000 units of its stock as part of the purchase price therefor. That "these defendants" including Shingle and Brown "wrongfully" received part of this 600,000 units of stock and "unlawfully" received part of the proceeds therefrom.

3. That defendants, *excluding Shingle and Brown* [Ind. p. 4, lines 26 and 27, R. p. 31; F. N. 15, B. P. par. 4-h, R. p. 155], applied to and received from the Corporation Commissioner of the State of California, on or about May 16, 1928, a permit authorizing Italo to issue to Brownmoor 600,000 units of Italo stock for the Brownmoor assets, and that these same defendants issued this stock to the Brownmoor on June 1, 1928. That a permit was applied for (by the Brownmoor Company) to distribute this 600,000 units of stock to the Brownmoor stockholders but the permit authorized distribution of only 575,000 units, but the total 600,000 units was distributed before this permit was received. *It is not claimed that Shingle or Brown participated in the proceedings before the Corporation Commissioner,* but they are included among those who are alleged to have received some of this stock, it being alleged that they were not Brownmoor stockholders. [Ind. p. 9, lines 29 and 30, R. p. 32; B. P. par. 4-j, R. pp. 155 and 156.]

4. The Big Syndicate.

That certain defendants, *including Shingle and Brown,* formed and became members of a syndicate; that some of the defendants, *other than Shingle and Brown* [Ind. p. 6, R. 33; F. N. 22, B. P. par. L-2, R. p. 156], while officers and directors of Italo caused Italo to issue 6,000,000 shares (3,000,000 units) of its stock to the Syndicate for $3,500,000, and that the defendant Syndicate members, *including Shingle and Brown,* should "wrongfully" receive profits as members of the Syndicate.

In his closing argument to the jury, Assistant Attorney General Wharton admitted that there was no fraud in the $80,000 Loan Syndicate, nor in the Brownmoor transaction, nor in the Big Syndicate. He rested his plea for conviction on the purchase by Italo of the McKeon Company assets. This concession does not appear in the record because it is not properly a part thereof, but such was the concession and we do not believe it will be seriously disputed, because the concession is in accord with the evidence as will appear. We shall, therefore, point out that appellants Shingle and Brown were not charged in the indictment or bill of particulars with having participated in the transactions whereby Italo acquired the McKeon Company assets, or in the alleged secret arrangement and agreement with respect thereto, or the receipt of the so-called "secret profits" alleged to be involved therein.

5. Purchase of McKeon Company Assets by Italo.

That "some of the defendants," *excluding Shingle and Brown* [Ind. p. 6, line 23, R. 34; F. N. 27, B. P. par. L-3, R. 156], while dominating and controlling Italo, and while its officers and directors, on or about July 5, 1928, caused Italo to contract with the McKeon Company to purchase the McKeon Company's assets "at a consideration far in excess of the actual value of said assets" and to issue and deliver 4,500,000 Italo shares as a part of the consideration. The bill of particulars specifies the defendants Masoni, Perata, Tommasini, DeMaria, Howard Shores, Siens, Robert S. McKeon, Westbrook and Wilkes, as those defendants who participated in this transaction. [Ind. p. 6, line 23, R. 34; F. N. 27, B. P. par. L-2 and 3, R. 156.]

6. That eight of these nine officers and directors (Tommasini omitted), *Shingle and Brown being excluded,* had a "secret arrangement and agreement," *that these same eight defendants* [Ind. R. p. 34; F. N. 31, B. P. L-4, R. 156-157] would receive back from McKeon Company 2,500,000 of the 4,500,000 shares without giving consideration therefor other than causing Italo to make the purchase contract.

7. That the defendants [Ind. p. 7, lines 19 and 20, R. p. 34; F. N. 36 described in B. P. par. O-3 and L-4, R. 156-157, as the same above-named eight defendants, *but excluding Shingle and Brown*] sold some of this stock received by them under the aforesaid secret arrangement

and agreement and converted the proceeds thereof to their own use and benefit.

8. That the same eight defendants, *excluding Shingle and Brown* [Ind. p. 7, lines 26 and 27, R. p. 35; F. N. 38, B. P. par. L-5, R. p. 157], represented in an application to the Corporation Commissioner for a permit for Italo to issue the 4,500,000 shares to the McKeon Company, that the McKeon Company was to receive 4,500,000 shares when they in fact knew that the McKeon Company would only receive 2,000,000 shares and that they were to receive the remaining 2,500,000 shares.

It will be observed that neither Shingle nor Brown is alleged to have had knowledge of or to have participated in any of these transactions respecting the acquisition of the McKeon Drilling Company's assets, or the secret arrangement and agreement with respect to the stock, or the sale of the said stock, or the receiving of any proceeds from the sale thereof. We have carefully set these matters forth for the benefit of the court because of our contention that the court erred in admitting evidence against these appellants over their objections that they were not charged therewith in the indictment and bill of particulars.

The remaining allegations of the indictment respecting the payment of dividends by Italo-American and alleged misrepresentations will not be referred to because we are not connected in the evidence therewith and they are sufficiently described in the McKeon brief.

STATEMENT OF FACTS AS DISCLOSED BY EVIDENCE.

As already stated, the McKeon brief summarizes the evidence with respect to the acquisition of the various oil properties. The appellants Shingle and Brown were not officers, directors or fiduciaries of any of the corporations involved in those transactions, and we shall only amplify the McKeon statement insofar as it is necessary to avoid confusion and to properly present the situation of these appellants as shown by the evidence.

Antecedents of Fred Shingle and Horace J. Brown.

Fred Shingle, 46 years of age, was born in Cheyenne, Wyoming, and has a wife and two daughters. [R. 882-883.] Upon his graduation from the University of California he worked in San Francisco with E. H. Rollins & Sons, a bond house, in positions ranging from office boy to city salesman, thereafter was employed in the Bond Department of the Savings Union Bank & Trust Company, looked after the interests of his brother Bob Shingle and his associates in the United Western Consolidated Oil Company, and in 1919 established an investment business which in August, 1919, became Shingle, Brown & Co., and with which the defendants Brown, Jones and Mikel became connected. The firm dealt almost exclusively in bonds until 1926 when it joined the San Francisco Stock Exchange and did a general brokerage business as well.

Horace J. Brown, 50 years of age, has resided in California since 1887. He was educated in the primary and high schools in San Diego, and then became a newspaperman with the San Diego Sun, edited newspapers in

Fresno and in Sacramento and was editor of the San Francisco News from 1909 to 1914. He became the First Chief Deputy Commissioner of Corporations under Commissioner H. L. Carnahan, became manager of the Marchant Calculating Co. in Oakland, and thereafter joined Fred Shingle in the formation of Shingle, Brown & Co. He is married and has two children.

That appellants Shingle and Brown were and are men of excellent reputations and clean business antecedents is clearly shown by the record. Their excellent reputations for truth, honesty and integrity in San Francisco where they resided and conducted their business was attested by the following witnesses:

The late George Presley, manager of the San Francisco Chamber of Commerce, and a member of the legal firm of Thomas, Beedy & Presley.

James K. Lockhead, Executive Vice President of the American Trust Co. of San Francisco.

Edwin M. Daugherty, Commissioner of Corporations of the State of California.

Hartley F. Peart, prominent attorney of San Francisco.

Walter Hood, member of the firm of Hood and Strong, certified public accountants of San Francisco.

Bradford M. Melvin, member of the firm of Gregory, Hunt & Melvin, attorneys, San Francisco.

Howard G. Tallerday, President Western Pipe & Steel Co. of San Francisco. [R. pp. 867-872.]

It affirmatively appears from the evidence that neither Shingle nor Brown was at any time an officer, director or fiduciary of either of the Italo corporations, nor of any of the other corporations mentioned in the evidence as engaged in the oil business. Neither of them had anything whatsoever to do with the negotiations for the purchase of any of the properties acquired by Italo, neither of them at any time exercised any domination or control over Italo or the other corporations, or the officers or directors thereof, and neither of them at any time had access to or knowledge of the contents of the books or records of these corporations. They were members of an independent financial concern which dealt at arm's length, fully, fairly and above board, and fully performed its obligations in a fair and legal manner.

Although Shingle, Brown & Co. had wound up its business about December 31, 1930, prior to the indictment herein, it had preserved all of its books and records concerning its business transactions. That the appellants had no knowledge of or consciousness of any wrongdoing or guilt is demonstrated by the fact that the auditor of Shingle, Brown & Co. was instructed by appellants to cooperate with the government postoffice inspector in every way as shown by the testimony of the witness Byers [R. p. 466]:

> "When the postoffice inspectors called on Shingle, Jones and Brown relative to getting access to their books and records, I was instructed by Shingle, Brown and Jones that they had absolutely nothing to conceal in those various books and records they had, and instructed me to give the postoffice inspectors full and complete access to them and assist them in any manner I could, which I did."

Shingle and Brown Not Connected With Italo-American or Early Activities of Italo-Pete.

The history and activities of Italo-American and Italo are adequately recited in the McKeon brief, pages 17 to 26. Since it is conceded that neither Shingle nor Brown were officers or directors or fiscal agents of either corporation, and that they had no dealings with Italo prior to the $80,000 loan in May, 1928, we shall simply refer the court to the records substantiating these statements. [Testimony of Courtney Moore, R. p. 197, and Stipulation, R. pp. 230-231.]

Evidence Respecting $80,000 Loan and Purchase of Brownmoor Assets by Italo.

The evidence respecting the negotiations for and acquisition of the Brownmoor properties is summarized in the McKeon brief, pages 26 to 31, and is hereby adopted.

While it affirmatively appears from the record that Shingle and Brown were not officers, directors, agents or fiduciaries of either Italo or Brownmoor and had nothing whatsoever to do with the negotiations leading to the purchase of the Brownmoor assets by Italo at a consideration alleged in the indictment to have been "far in excess of its actual value" and had little familiarity with the purchase transaction, it is appropriate to call the attention of the court to the appraisals of the Kern River Front property acquired by Italo from Brownmoor. The report of Dr. Eric A. Starke, a reputable and recognized petroleum and geological engineer, places a value of $4,225,-835.00 on this property, which was accepted by the corpo-

ration commission [Exhibit 25, R. pp. 795-6], while the report of D. R. Thompson, a reputable petroleum engineer [Exhibit J-b, R. p. 705], places a valuation of $2,984,000.00 This property and a small refining plant were acquired from Brownmoor by Italo for 600,000 units of Italo, having a value to Italo on the basis of $1.50 per unit less 15% commission (the price at which Italo was currently selling its stock to its fiscal agent Frederic Vincent & Co.) of $765,000.00. To this purchase price should be added $100,000 of Brownmoor indebtedness assumed by Italo in the transaction.

Frederic Vincent and George Stratton, partners of Frederic Vincent & Co., had knowledge of the negotiations pending between Italo and Brownmoor for the acquisition of the Brownmoor assets. They were fiscal agents of Italo and thereupon proceeded to acquire options on and purchase Brownmoor stock as early as March, 1928. [R. p. 393.] Negotiations between Wilkes, representing Italo, and Siens, representing Brownmoor, resulted in late April, 1928, in an agreed purchase price of 600,000 units of Italo stock for the Brownmoor assets, (600,000 shares of preferred and 600,000 shares of common) and the assumption by Italo of $100,000 of Brownmoor indebtedness. Italo was not then financially prepared to close the deal, and despite the importunities of Vincent and Stratton, Wilkes refused to execute the contract for Italo unless Italo could raise between $80,000 and $100,000 to take care of its obligations and carry on drilling operations. [R. p. 706.] That Italo's cash situation was poor at that time is shown by the evidence of the auditor, L. J. Byers, who testified that its books showed only $53.24 in the bank May 1, 1928, which was thereafter

followed by overdrafts through May 11, 1928, amounting to a maximum overdraft of $20,845.39. [R. p. 951.]

Thereupon Wilkes and Vincent who had no previous dealings with Shingle and Brown with respect to Italo approached them to assist Vincent & Company in financing Italo. Shingle [R. p. 884] and Brown [R. p. 963] declined to become interested in selling Italo stock, stating that they were engaged only in underwriting securities of established and stabilized businesses and not initial financing of oil companies or other ventures.

A few days later Wilkes and Vincent proposed to Shingle and Brown that they loan Italo $80,000, Vincent offering as an inducement 80,000 shares of Brownmoor stock owned by him to be given to the lenders of the money as part consideration for the loan, *and he further assured Shingle and Brown that as the holder of options on Brownmoor stock he would give Shingle and Brown a share of the profits which he expected to realize therefrom.* These facts appear from the evidence of Shingle [R. p. 885], of Brown [R. pp. 964-966] and Wilkes [R. pp. 742-743], and was not disputed by Vincent. [R. pp. 442-443.]

Security was offered as collateral for the loan, the adequacy of which was investigated and found to be sufficient, and thereupon Shingle and Brown agreed to make the $80,000 loan and to form a syndicate for that purpose. Shingle became trustee for the syndicate and subscribed $5,000 thereto. Some of the persons associated with Italo subscribed to the syndicate voluntarily. The agreement with Italo [Exhibit 238, R. p. 467] provided for the repayment of the loan in four equal quarterly instalments with interest at the rate of 7% per annum, and pledged

as security certain properties of Italo. The time of payment was so arranged because it was anticipated that the notes would be met through stock sales by Frederic Vincent & Co., whose contract called for minimum returns to Italo of $15,000 per month. The agreement between the syndicate members [Exhibit 142, R. p. 383] recited that the purpose of the syndicate was to lend $80,000 to Italo and that it being to the interest of "certain individuals" that Italo obtain such loan, such individuals were contributing 80,000 shares of Brownmoor stock as part of the consideration therefor, such stock to be distributed ratably to the members of the syndicate, but that if the Brownmoor stock was exchanged for Italo stock that 40,000 units of Italo stock would be issued in lieu of the 80,000 shares of Brownmoor stock.

Brownmoor Purchase.

The 80,000 shares of Brownmoor stock was deposited with Shingle a few days prior to making the loan as collateral security for a $10,000 loan, to which Shingle advanced $5,000 and Frederic Vincent & Co. $5,000 to enable Wilkes to close an oil lease at Cat Canyon concerning which testimony was given by Shingle [R. pp. 888-889], Brown [R. pp. 966-967] and Wilkes [R. p. 746]. Government witness Stratton in his testimony confirmed the fact that the 80,000 shares was first held at Vincent & Co.'s office. With the release of the collateral in this transaction the 80,000 shares of Brownmoor were held by Shingle for the benefit of the $80,000 loan syndicate.

With the announcement of the acquisition of the Brownmoor properties a marked change occurred in the finances of Italo. Whereas, prior to that time Vincent & Co. were

unable to market stock rapidly enough to meet Italo's needs, sales became very rapid and in the latter half of May Vincent & Co. paid over $300,000 into the company [R. p. 952] which thereupon decided to repay the $80,000 loan a few days after it had been paid and release its pledged properties. On this subject Wilkes [R. pp. 710-711], Shingle [R. pp. 889-890] and Stratton [R. p. 420] testified in accord.

Upon completion of the Brownmoor purchase Italo issued its certificates for 600,000 shares of its preferred stock and 600,000 shares of its common stock to Brownmoor Oil Company which was by Brownmoor distributed to the owners of its stock. Subscribers to the syndicate of $80,000 as the owners of 80,000 shares of Brownmoor stock held in their behalf by Shingle as syndicate trustee received ratably their proportion of 40,000 units of Italo stock upon the surrender by Shingle of the Brownmoor certificates. As a matter of fact, upon the basis of proper distribution by Brownmoor of the 600,000 units of Italo to the holders of 1,000,000 shares of Brownmoor the syndicate should have received 48,000 units. But Shingle, having had no part in the transaction between Italo and Brownmoor, did not know what the basis of distribution was. [R. p. 889.]

The record clearly discloses that the syndicate received from Italo only the return of its money and interest thereon. In refutation of the indictment charges that defendant members of the $80,000 loan syndicate "wrong-

fully" received as a bonus 80,000 shares of Italo to the injury of Italo stockholders, G. S. Goshorn, the government's chief accountant witness, testified:

> "Italo Petroleum Corporation of America never put up the 80,000 shares of Brownmoor Oil Company stock that became the bonus stock for the $80,000 loan syndicate. The four certificates for 20,000 shares each issued in the name of Fred Shingle, aggregating 80,000 shares of Brownmoor Oil Company stock, was deposited with Fred Shingle as collateral security on the $80,000 loan syndicate agreement. *My examination of the books and records of the Italo Petroleum Corporation of America did not disclose that it paid any bonus to any syndicate member on that $80,000 loan.*" [R. pp. 651-652.]

As has been related, Frederic Vincent, for the purpose of inducing the loan to Italo, stated that he held options on Brownmoor stock out of which he expected to realize a profit which he promised to divide with Shingle and Brown. On June 11 he came to Shingle and presented him with a check for $83,000 as such share, which was credited as profit to Montgomery Investment Company, a private trading account of partners Shingle, Brown, Jones and Mikel.

Brown testified:

> "I saw Mr. Vincent hand that $83,000 check, Exhibit 149, to Mr. Shingle, about the date the check bears. Vincent came in and laid the check on Mr. Shingle's desk and said, 'I told you boys I would cut you in on my deal and here it is.' Mr. Shingle expressed some astonishment at the size of the check, and Vincent said he had a very successful

deal, thanks to us, and also he was very happy to (have us) become more closely associated with the company. I had a number of conversations with Vincent later, in the next two or three years, and he was very proud of the $83,000. Generally he talked considerably about what a nice piece of money he had made for us boys, * * *

"About the time the postoffice inspectors were engaged in an investigation of this case, I went to Frederic Vincent and asked him what this deal was all about and whether he had ever made any accounting to us, because I wanted to know what the thing was so I could explain it. He said, 'There is no necessity of you knowing anything about this deal at all, it is a deal between broker and broker. You had a perfect right to receive the money and I had a perfect right to give it to you.'" [R. pp. 970-971.]

Later [R. p. 891] and on different days Wilkes brought to Shingle a check for $24,750 and a check for $44,092.90 from Frederic Vincent & Co. which was at his request credited to David Garvey, a brokerage trading account carried by Shingle, Brown & Co., into which he had transferred his own account [R. p. 891] and which was subject to the control of W. J. Cavanaugh [R. p. 751].

Of the $68,842.90 placed in the David Garvey account $50,000 was subscribed in Garvey's name to a second syndicate later referred to herein and subsequently assigned as subscriptions to such syndicate of Perata and Masoni each in the amount of $25,000. These funds according to the testimony of Wilkes [R. pp. 749-751] went to Perata and Masoni in accordance with an agree-

ment between them and Vincent & Co., whereby they had agreed and stood ready to finance half of Vincent & Co.'s purchase of Brownmoor stock. [R. pp. 709-710.] It was also testified that the $25,000 assigned as the subscription of Masoni was later withdrawn by Wilkes who gave Masoni in its stead 21,000 units of Italo stock. The remainder of the funds deposited in the Garvey account from Vincent & Co. were retained by Wilkes pending a settlement from Vincent & Co., who, he asserted, had promised to compensate him in his early activities in the development of the Italo corporations in which he served without salary. [R. p. 771.]

It appears from the record, *although not known to Shingle and Brown at the time of the transaction that Frederic Vincent & Co. were the purchasers of 950,000 of the outstanding 1,000,000 shares of Brownmoor Oil Company* or of the ratable equivalent of Italo stock distributed by Brownmoor, which according to the testimony of government witness Stratton, partner in Frederic Vincent & Co. was purchased as follows:

240,000 units of Italo stock, representing the equivalent of 400,000 shares of Brownmoor from Siens, Shores and Westbrook for $288,000. [Exhibit 151—R. p. 391.]

100,000 shares of Brownmoor stock, variously referred to in the record as the E. M. Brown or Cragen stock from E. M. Brown for $22,500. [R. p. 393.]

250,000 shares of Brownmoor stock variously referred to in the record as the E. M. Brown or Monrovia stock for $60,000. [R. p. 393.]

200,000 shares of Brownmoor stock, the property of one Edna V. Cooper under agreement of sale to one Thomas Conlin for $50,000 and by Conlin assigned to Frederic Vincent & Co. [Exhibit 140—R. p. 380.]

That Frederic Vincent & Co. were the original purchasers in fact of the 550,000 shares of Brownmoor referred to in the last three paragraphs *supra* is further confirmed by [Exhibit 171—R. pp. 405-406], a letter dated May 28, 1928, addressed by A. G. Wilkes to Frederic Vincent & Co. as follows:

"Gentlemen:

"With reference to the purchase of the Brownmoor stock; I have in my possession two Certificates in the name of the Brownmoor Oil Company, one for 600,000 shares of Italo Petroleum Corporation Common Stock and one for 600,000 shares of Italo Petroleum Corporation Preferred stock, which I am authorized to hold until the permit from the Corporation Commissioner is obtained permitting the distribution of this stock to the shareholders of the Brownmoor Oil Company.

"I am also holding for your protection a Certificate for 420,000 shares of Brownmoor stock, out of which you are now the owners of 100,000 shares, which you purchased and have paid for at $22,500.

"I am also holding, assigned in blank, *two contracts,* one of the purchase *of 200,000* shares of the amount of $60,000 on which you have already paid the sum of $25,000, and one for the purchase of *250,000 shares* for the sum of $50,000, on which you have paid $6,000. There is a balance due on these two purchase contracts of $35,000, on the 200,000 share lot, and $44,000 on the 250,000 share lot.

"As soon as these purchase contracts are completed, you will be entitled to receive the 450,000 shares of Brownmoor stock or its equivalent in Italo Petroleum Corporation stock. The distribution of this stock will be in accordance with our understanding.

"Yours very truly,

A. G. WILKES."

From the records of Italo it appeared that when the certificates for 600,000 units of Italo stock issued to Brownmoor were broken up, certificates for 230,000 units were placed in the name of Fred Shingle. These were in four certificates representing 34,583 shares of common stock, 34,583 shares of preferred stock, 195,417 shares of common stock and 195,417 shares of preferred stock.

But it was also shown that to the receipts for such certificates the name of Fred Shingle was forged or otherwise applied by Frederic Vincent. This was stipulated by the government [R. p. 269] and admitted by Frederic Vincent. [R. p. 440.]

Stratton and Vincent in their testimony declared that they had purchased this 230,000 units of stock from Fred Shingle, despite their previous testimony and written evidence that they had bought and contracted to buy all of the Brownmoor stock or its equivalent less 50,000 shares and thus attempted to explain the checks for $83,000, $24,750 and $44,092.90 above referred to.

Bearing in mind that Frederic Vincent & Co. had bought or contracted to buy all of the Brownmoor stock

or its equivalent except 50,000 shares we cite the testimony on this subject of Frederic Vincent:

> "Stratton and myself purchased some stock through Wilkes purported to belong to E. M. Brown, and also some stock that purported to belong to Edna V. Cooper, all of which was Brownmoor stock, and also stock that purported to belong to Siens, Westbrook and Shores. Wilkes was the only person that I talked to about purchasing this stock. We also purchased some 230,000 shares of stock *which was carried in the name of Fred Shingle. I talked to Wilkes concerning the purchase of this stock. I do not recall talking to anybody else.* This 230,000 units of stock was Italo stock and not Brownmoor stock. This receipt, Exhibit '38,' signed by Fred Shingle, dated June 1, 1928, is signed by me. The words 'Fred Shingle' are in my handwriting on that receipt. I do not remember the circumstances under which I placed my handwriting on those receipts." [R. p. 440.]

And again:

> "I received a 230,000 unit lot of Italo Pete stock in the name of Fred Shingle and signed Exhibit '38' which was a receipt for that stock. *It is my recollection that I did not talk to Fred Shingle or Horace Brown or any member of the firm of Shingle, Brown & Company about signing these receipts. The sole source of my information was from conversations with Wilkes."* [R. p. 443.]

Witness Stratton [R. pp. 424-425-426] made a lengthy and involved statement *that although his firm was already the purchaser of all the Brownmoor stock as confirmed*

by the Wilkes letter he was told by Wilkes another large block of stock had to be purchased through the office of Shingle, Brown & Co., to adjust some error, that he did so and the checks issued were his only records of the transaction. He stated that in the transaction involving 230,000 units of stock he never discussed the matter or dealt with Shingle or Brown or with any member or representative of the firm of Shingle, Brown & Co. He discussed the subject only with Wilkes and Vincent and did not remember ever asking Wilkes what the mistake or adjustment was which led him to pay twice for the same stock.

Shingle testified [R. pp. 891-892] that he may have endorsed the certificates in question as a matter of accommodation, he or his firm never owned the stock or had any interest in it and there was lacking in the records of Shingle, Brown & Co. any record of it. Witness Byers, former auditor of Shingle, Brown & Co., testified [R. pp. 952-953] that a diligent search of the records failed to show any entry in respect thereto. Brown testified to the same effect [R. pp. 972-973], and further testified:

> "With respect to the testimony of Mr. Stratton, referred to by Mr. Wharton on cross-examination, to the effect that Frederic Vincent & Company purchased 195,000 units of Italo Petroleum Corporation of America on June 11, 1928, and paid Shingle, Brown & Company the sum of $107,750.00 therefor, and two days later bought an additional 34,000 units of the same stock and paid therefor $44,000, *it is not a fact that we sold Frederic Vincent & Company 195,000 units of said stock on June 11, 1928, and received therefor the sum of $107,750.00. It is not*

true that two days later we received $44,000-odd for 34,000 units of said stock. A little simple arithmetic would show that the first transaction represented by those checks the price would be 55 cents per unit, and the next block the next day represented $1.27½ per unit. It does not make any sense. *We did not sell any stock; we never owned it."* [R. pp. 1021-1022.]

Wilkes testified [R. pp. 748-750] that he caused the certificates in question to be issued in Shingle's name in order to protect Perata and Masoni in their dealings with Vincent, in so doing did not discuss the matter with Shingle but may have told him that he was going to do so as a matter of accommodation, and *that neither Shingle nor Shingle, Brown & Co. had any interest in the certificates.*

In further refutation of the Stratton and Vincent story of the purchase of stock from Shingle or his firm defendants introduced into evidence a pencilled memorandum [Exhibit E—R. p. 426] in the handwriting of Stratton concerning the disposal of 270,000 units of Italo stock apparently accounting for the equivalent of the 450,000 shares of Brownmoor stock purchased by Frederic Vincent & Co. from E. M. Brown (the Monrovia stock) and from Cooper. This exhibit, taken in connection with the Wilkes letter of confirmation (*supra*) completely accounts for the 270,000 units, and shows that after the deduction of 40,000 units which Vincent & Co. gave to the $80,000 syndicate and the deduction of 91,666 units at $1.20 representing Vincent & Co.'s cost of the stock—$110,000, Shingle, Brown & Co. is credited

with $83,000 cash, representing half of the profit of the transaction.

While Stratton under cross-examination [R. pp. 426-427-428] admitted the writing but couldn't recall the reason for making it, he could think of no combination of circumstances in which it reflected any other facts than the donation from the stock previously purchased by Frederic Vincent & Co. of 40,000 units to the syndicate and the division of profit with Shingle, Brown & Co. and declared that neither his partner Vincent nor Wilkes had ever told him of the arrangement between Vincent & Co. and Shingle, Brown & Co.

In preparing his chart, Exhibit 299, purporting to be a summary of the disposition of the 600,000 units of Italo received by Brownmoor Oil Company for its properties and ascribing 230,000 units thereof to Fred Shingle, *government accountant Goshorn admitted on cross-examination* [R. pp. 678-679] *that he had found no record anywhere that Vincent & Co. had purchased the 230,000 units from Shingle or Shingle, Brown & Co.* except the checks made to Montgomery Investment Co. and the fact that the certificates were once issued in Shingle's name, that there was no record of confirmation of such sale and no record showing that Shingle ever received the stock.

Government witness *Goshorn further testified* at length [R. pp. 655-656] analyzing Exhibit 171, the Wilkes letter of confirmation to Vincent & Co., and Exhibit E, the Stratton memorandum, which he had not previously examined in preparing his chart, and stated *as a result of such examination and analysis it to be a fact that the 450,000 shares of Brownmoor resulting in 270,000 units*

of Italo had been purchased by Frederic Vincent & Co. for $110,000, that the 230,000 units receipted for by Frederic Vincent in signing Fred Shingle's name to Exhibit 36 were retransferred to Frederic Vincent & Co.'s nominees and that no part of this stock went back to Shingle.

Government witness Lyle, transfer agent of Italo, testified on this subject:

> "The fact that Exhibit 38 is signed by Frederic Vincent would absolutely indicate to me that Frederic Vincent is the one who received certificates numbered 984 and 985, part of Exhibit 37." [R. p. 304.]

And government witness Sunderhauf, also transfer agent and assistant secretary of Italo, testified that he never received any instructions from Shingle or Brown to issue the certificates above referred to, that the certificates were surrendered to Frederic Vincent & Co., retransferred in part to several hundred people pursuant to Vincent & Co. instructions, the remainder issued back to Vincent & Co. and that none of the stock was issued to Shingle or Brown. [R. pp. 277-278.]

The charges of the indictment that all of the 600,000 units of Italo received by Brownmoor Oil Co. were distributed by Brownmoor to its stockholders prior to the receipt of permit therefor from the Commissioner of Corporations and in violation thereof in that such permit authorized the distribution of only 575,000 units appear to be true, *although in what way such actions by the officials of Brownmoor constituted any part of a plan to defraud Italo is not made manifest.* The record shows that the permit authorizing Italo to issue the 600,000

units to Brownmoor in exchange for its properties was issued May 16, 1928. The certificates for the 600,000 units [Ex. 37—R. p. 277] were issued to Brownmoor Oil Co., pursuant to such authority under date of June 1, 1928, registered June 7, 1928, and delivered later. Vincent received and broke up some of the stock to deliver to his clients June 15, 1928. It appears that the permit of the Corporation Department authorizing the distribution by the Brownmoor was issued June 19, 1928. [Ex. 274—R. p. 512.]

It is also charged in the indictment that some of the Italo stock was distributed to persons other than stockholders of Brownmoor, in support of which the government introduced into evidence a schedule prepared by accountant Goshorn from the stock certificates books of Brownmoor Oil Co. [Ex. 298—R. pp. 632-633.] It later appeared, however, upon production of the records of Bank of America (formerly Merchants National Trust & Savings Bank of Los Angeles), registrar and transfer agent [Ex. 147—R. pp. 650-651], that the government exhibit was not the true record, Brownmoor Oil Co. having changed its capital structure [R. p. 815] and the records of issuance of stock thereafter kept by the bank. Goshorn had made no examination of these records.

It abundantly appears from the record that Frederic Vincent & Co. was the purchaser, either of Brownmoor stock in its original form or units of Italo resulting therefrom of all except 30,000 units of the 600,000 units of

Italo resulting from the sale of Brownmoor assets and received the stock so purchased, so that *the Brownmoor distribution appears to have been made to the persons entitled thereto. It is not claimed that the Brownmoor stockholders were defrauded.*

At any rate Shingle and Brown, not being officers or directors of Brownmoor had no responsibilities for the distribution of its stock.

That neither Shingle nor Brown had any connection with either Italo or Brownmoor corporation was testified by Shingle:

> "Neither Horace Brown, Axton Jones, Rossiter Mikel nor myself was ever a director or officer of the Italo American or Italo Petroleum Corporation or the Brownmoor corporation, or of any of the other corporations which have been mentioned here, except Shingle, Brown & Company.
>
> "I knew nothing at any time of any connection or transaction of Siens, Westbrook, Shores, Mrs. Cooper, Cragen, or any one else with the Brownmoor Oil Company, and never heard of any of those transactions." [R. p. 898.]

The foregoing recitals are made at some length because the indictment alleged improper distribution of Brownmoor stock and government witnesses Stratton and Vincent endeavored to falsely show that Shingle and Brown were involved in transactions in which they had no part. Appellants maintain that their recitals of what actually oc-

curred are correct, so proven by the facts evolved and that their actions in the Brownmoor transaction were wholly within their rights as independent brokers in nowise connected with either Italo or Brownmoor as officers, directors, agents or in any fiduciary capacity.

That the $83,000 received by Shingle for himself and partners from Frederic Vincent & Co. in accordance with the latter's agreement to divide its profits, while substantial was not extraordinarily munificent, is evidenced by the facts appearing in the record. It appears therefrom that Frederic Vincent & Co.'s total cost for the 950,000 shares of Brownmoor or the resultant 570,000 units of Italo was $420,500, made up as follows: 550,000 shares of Brownmoor equalling 330,000 units of Italo purchased as per Wilke's letter [Exhibit 171—R. pp. 405-6], $132,500; 240,000 units of Italo (equalling 400,000 shares of Brownmoor) purchased from Siens, Shores and Westbrook [Exhibit 151—R. p. 391], $288,000. Stratton testified [R. p. 430] that about the time Frederic Vincent & Co. received the stock, June 14, 1928, "we were selling the stock at $2.50 per unit." At this rate the 570,000 units, less the 40,000 units given to the syndicate, represents a gross selling price of $1,325,000 against a cost of $420,500, *or a gross profit before sales expense of $904,500.*

BIG SYNDICATE.

As the McKeon brief on appeal deals extensively with the general subject matter of the second or so-called big syndicate operation we will refer herein principally to certain supplementary evidentiary facts having to do with the activities of Shingle and Brown in connection therewith. [McKeon Brief pp. 77-115.]

The syndicate operation, of which Fred Shingle was manager, resolved itself into a simple underwriting of cash payment obligations of Italo on property purchase contracts up to $3,500,000. Italo, under a permit issued August 9th, 1928, by the Commissioner of Corporations [Ex. 18-25—R. p. 535], was authorized to issue 12,000,000 shares of stock to Maurice C. Meyers, as Trustee, to be used to acquire certain properties subject to indebtedness not to exceed $2,750,000. The contracts for these properties, including those of McKeon Drilling Co. and Graham-Loftus Co. called for payments in stock of approximately 6,000,000 shares and in cash approximately $6,250,000, of which $3,500,000 had to be paid within a period of a few months. The syndicate underwrote and paid the urgent cash requirements of approximately $3,500,000 for which it received 3,000,000 units or 6,000,000 shares of stock, pursuant to agreements entered into with Trustee Meyers and Italo. [Ex. 83—R. p. 304; Ex. 84—R. p. 302.] The payments in stock were handled solely by Trustee Meyers and accounted for by him to Italo, the syndicate having nothing to do with that phase of the transaction.

The syndicate through advancement of its own subscribed funds of $1,911,375, including the amount subscribed by Shingle, Brown & Co., and from the proceeds

of sales of stock completed its contract and on December 20, 1928, received a full release of its obligations from Italo and from Meyers, Trustee. [R. pp. 916-917.] It thereupon became the owner of all of the remaining unsold stock underwritten by it and had no further connection with or responsibility to Italo or Meyers, Trustee.

Most of the payments by the syndicate for property accounts were made to Maurice C. Meyers, attorney for Italo and Trustee of the 12,000,000 share issue and accounted for by him to the Syndicate Manager. Such accounting, consisting of many transactions is contained in Exhibit 308. In respect to such accounting Meyers testified:

> "I rendered an accounting as two trustees, really; one was as trustee of the syndicate in the handling of the money, and the other was trustee for the company as to the 6,000,000 shares of stock. As trustee for the syndicate I handled over $3,000,000; it was close to $3,400,000, although some of the money was disbursed at San Francisco.
>
> "At the conclusion of my trusteeship, accountings were rendered to the company and to the syndicate. To the best of my knowledge and belief the accountings rendered by me as trustee to the syndicate and the company were true and correct accountings.
>
> "The remittances from Shingle, Brown & Company or from Fred Shingle, syndicate manager, were to apply on purchase contracts that had already been made. As such trustee I carried out to the best of my ability the contracts already entered into for the acquisition of properties by the Italo, both for the payment of money and the disbursing of stock." [R. p. 1046.]

Other smaller payments on properties closed in the northern part of the state were made through Melvin and Sullivan, San Francisco counsel for Italo, and balance of payments in final adjustment of the account were made direct to Italo.

That the syndicate was organized for a legitimate financial purpose, that its relations with Italo were at all times fair and above board, that it entered into a fair contract with Italo to underwrite and purchase a block of Italo's stock at a fairly negotiated price and did faithfully perform its contract is abundantly shown by the record and is not disputed by any evidence therein contained. The syndicate did not, nor did Shingle or Brown ever receive one cent of commission or compensation from Italo, the syndicate underwriting being at a net price.

Shingle and Brown Not Connected With Property Purchase Negotiations.

That neither Shingle nor Brown had anything to do with negotiations for the purchase of any of the properties acquired by Italo is affirmatively shown by the record and is not in any manner disputed by the government. On this subject Brown testified:

> "Neither Mr. Shingle nor myself had anything whatsoever to do with the negotiations for or the making of the contracts for the acquisition of any of those properties." [R. p. 988.]

Robert McKeon testified [R. p. 1184] *that all of his negotiations concerning the McKeon Drilling Co. properties were with Wilkes representing Italo "and neither Fred Shingle, nor Horace Brown had anything to do with those negotiations."*

Syndicate Management.

The McKeon brief [pp. 95-108] deals fully with the failure of Frederic Vincent & Co. to perform its functions as the sales agency of the syndicate and the crucial situation leading to the formation of a group of stock exchange brokers to handle the financing as a market transaction, Shingle, Brown & Co., Inc., joining this group or pool. On this subject Brown testified:

> "There was never at any time any secrecy about the fact that Mr. Shingle would be the syndicate manager or that Shingle, Brown & Company were members of this brokerage pool. We became members of the brokerage pool very largely because if it was not good enough for us to take hold of our fellow brokers naturally would not join, and we were also willing to do it because we believed the company had a great future.
>
> "The officers of the Italo Petroleum Company were well acquainted with the fact that Mr. Shingle, in addition to being syndicate manager, was also interested in Shingle, Brown & Company and that Shingle, Brown & Company was a member of the pool, and they were delighted that we were. *In fact the officers of the Italo Company insisted that we try to form the pool in order to save the situation.*" [R. pp. 994-995.]

Occupying a somewhat dual position as Syndicate Manager and as an officer of Shingle, Brown & Co., a pool member, Shingle in fairness to his syndicate exacted a higher price from the pool for the common stock optioned to it than Frederic Vincent & Co. had been paying. The Vincent price had been $1.60 per unit net to the syndicate,

which in transactions involving sales of classes of stock separately, was divided as 57 cents per share for preferred stock and $1.03 per share for common. As Shingle testified:

> "We gave the pool members an option on 2,500,000 shares of common stock at various prices. As I remember, it was $1.05 for the first 500,000 shares, $1.10 for the second 500,000 shares, $1.15 for the third, and $1.20 and $1.25, a 5-cent step-up to the syndicate on each 500,000 shares." [R. p. 913.]

The option agreement dated October 15, 1928, addressed to Plunkett-Lilienthal & Co., Geary, Meigs & Co., Graham, Atkinson & Co., and Shingle, Brown & Co. [Exhibit 322—R. p. 942] recites the prices above stated less a selling commission of not to exceed $20 per 1000 shares, which Shingle testified would be a maximum of $10,000 commission on 500,000 shares.

As above related, with the settlement of the syndicate's account with Italo the remainder of the 3,000,000 units became the property of the syndicate in accordance with its purchase agreement and the syndicate had no further relations with Italo or with Meyers, Trustee. From time to time as proceeds from the sale of stock to the brokers pools were received such funds were distributed ratably to the members of the syndicate as their respective interests appeared. The return in cash to the members of the syndicate was approximately 52 per cent of the amount of their subscriptions and at the termination of the syndicate the remaining stock, amounting to approximately 2,500,000 shares of preferred and 900,000 shares of common were distributed ratably to the members of the syndicate. [R. p.

934.] Each member of the syndicate was furnished with a photostatic copy of the report of audit of the syndicate operations made by Lybrand, Ross Bros. & Montgomery, public accountants, and signed a receipt fully acquitting and releasing the Syndicate Manager. *There is no evidence in the record of any criticism by any of the more than 70 members of the syndicate concerning its management, which involved the handling of some $4,500,000.*

If Shingle and Brown had been better guessers it is probable that more of the syndicate stock would have been marketed in the spring of 1929 and a larger cash return made to the syndicate members. At that time negotiations were on, as will later be detailed, for the inclusion of the Italo properties into a larger company which John McKeon was to head, the deal being under negotiation with New York bankers. On this subject Shingle testified:

> "The big deal was never concluded. By that I mean the eastern deal. It was pretty well abandoned in the summer of 1929. If the deal had gone through on the basis Mr. McKeon was negotiating in New York the price of the Italo stock which would have been converted into the new name, which was going to be the McKeon Oil Company, would be $16 to $18 a share, which represents $1.60 to $1.80 per share for the old $1.00 par stock. We found ourselves in a rather embarrassing position with respect to the syndicate stock. The syndicate agreement gave the syndicate manager very broad powers. We could do what we wanted with the stock, but Mr. Brown and myself had a great many talks on the subject, and if we had sold any syndicate stock at around $5.00 or $10.00 or even lower, or at any

price, we would have sold it, we thought if the McKeon deal had gone through we would have been very severely criticized. During all of this time the market was very substantially less than $1.60 per share for the common. If the big deal had gone through as we expected it would, we would have been subjected to criticism and a great many of the large syndicate members, the members who had the largest amount in the syndicate, did not want us to sell, because it was for quite a while almost a certainty that the deal would go through. We discussed that question with some of the larger syndicate members and took their advice and acted as they suggested, and also it was our own judgment that we had better hold it." [R. pp. 926-927.]

The facts stated by Shingle were not disputed by the government in any way.

The controversy with Frederic Vincent & Co. resulting in its elimination as sales agent for the syndicate is fully covered in the McKeon brief and reference will be made here to one phase of the transaction to which the government endeavored, by inference, to attach a malign significance.

In settling with Vincent & Co., Shingle was advised that the former required about 100,000 units to complete its sales contracts previously made. Shingle thereupon reserved 122,000 units to take care of Vincent & Co.'s requirements and optioned all of the remainder of the unsold syndicate common stock to the brokers pool in the amount of 2,500,000 shares, to William Lacy in the amount of 100,000 shares and to a New York syndicate in the amount of 100,000 shares. [R. p. 991.]

Shortly thereafter Vincent & Co. made a demand, backed by threat of legal action, for additional stock to fill partial payment contracts of which they had previously failed to advise Shingle. In this emergency John McKeon agreed to fill Vincent & Co.'s requirements above the reservations made by the syndicate from the McKeon Drilling Co. stock in escrow with Shingle, Brown & Co.

Through an oversight in the accounting department Vincent & Co. was supplied from the syndicate stock 46,819 shares of common and 66,819 shares of preferred over and above the 122,000 units reserved for this purpose. When this was discovered December 12, 1928, the exact amount of stock so oversold was returned to the syndicate and $86,310.40, the exact amount paid into the syndicate therefor, was taken from the syndicate account and paid to McKeon Drilling Co.

The syndicate was not injured by the transaction and was in fact at the time benefited. As Brown testified [R. pp. 1000-1-2] the syndicate could have retained the proceeds of surplus sales of preferred stock to Vincent & Co. as it was not under option. But the Vincent price was 57 cents per share as against an open market price of 70 to 80 cents and the syndicate was benefited by the substitution of the McKeon stock, and as a matter of fact the syndicate did subsequently sell a considerable amount of preferred stock at prices ranging from 60 to 80 cents a share. *It should be remembered that there is no charge that the syndicate members were defrauded, but only that the syndicate members expected to profit from syndicate operations.*

Brokers Pools.

It is important that the court understand that the brokers constituting the pools which optioned and purchased Italo stock from the syndicate made a proper and careful examination of the affairs of Italo before entering the situation. While in the hectic days of 1928 with a widespread speculative interest in all securities most financial glasses were rose tinted, it is shown by facts adduced at the trial of the case that the brokers were justified in concluding that the properties being acquired were of great value and earning power and that Italo was destined to be a successful business operation.

It is equally important that the attention of the court be called to the manner in which the brokers handled the matter as a legitimate stock exchange transaction and not by inducing sales to the credulous and unwary through the employment of high-powered salesmen or through the circulation of literature designed to entice or deceive. There is no evidence that these reputable brokers, of standing and character in the communities in which they did business, engaged in practices of market rigging or created fictitious market prices, and only affirmative evidence, undisputed, that they handled the transactions on the open market as controlled by the laws of supply and demand in a highly speculative period.

The brokerage houses which variously were members of all or some of three successive pools which were organized to purchase stock from the syndicate were Shingle, Brown & Co., a corporation, Plunkett-Lilienthal & Co. and Geary, Meigs & Co. of San Francisco, and Graham-Adkisson & Co., M. H. Lewis & Co. and Dunk-Harbison & Co. of Los Angeles.

It is significant that at the trial of the case not a single witness from thousands of stockholders of Italo was produced who ever bought a share of Italo stock from Shingle, Brown & Co. or any of the brokers above named or on account of any representations made by them.

Government witnesses who testified that they purchased or otherwise acquired stock of Italo include Geis [R. pp. 539-540], Keating [R. p. 541], Hopkins [R. pp. 547-550], Willman [R. pp. 551-552], Hudspeth [R. p. 553] and Riniker [R. pp. 555-557], who acquired stock direct from one or the other Italo companies in exchange for their interests in other oil companies; Cohn [R. pp. 506-507], Robert [R. pp. 500-506], Anderson [R. p. 586] and Godfrey [R. p. 496], who bought stock from Frederic Vincent & Co.; Marks [R. p. 584], who bought stock from one Bentley and Gartner [R. p. 485], Biagini [R. pp. 488-492] and Rohde [R. pp. 577-583], who bought stock on the open market through other brokers.

As to the condition of Italo and the value and earning power of the properties which it was acquiring when the brokers undertook their investigation much appears in the record, which, on account of the extensive comment thereon in the brief prepared by counsel for John and Robert McKeon lengthy reference here would mean unnecessary duplication. Shingle testified:

> "So in this particular case, before the other brokers would join this pool, they naturally made a lot of investigations on their own behalf. There are three things that a broker wants to know about anything. First, what is the value of the property? Second, what is the management? And, third, what are the earnings? That is the foundation for any bond issue or stock issue." [R. p. 939.]

Included in the written data available for examination at that time as testified to by Brown [R. p. 987] were:

The Starke and Thomas appraisals of the value of the properties being acquired in exchange for 12,000,000 shares of Italo together with the compilation prepared therefrom by Engineer Abel of the Corporation Department. [R. p. 526.] This compilation shows a valuation, taking the lowest figures of various appraising engineers, of $29,416,860 and is followed by Abel's own computation combining lowest values of actual and possible production to reach a total valuation of $17,120,463 to which is added value of equipment, making a total estimated valuation of $18,847,158. As the properties were being acquired subject to $2,750,000 further purchase obligations, the net value was in excess of $16,000,000.

The certified statement of Wunner Ackerman & Sully, Certified Public Accountants [R. pp. 530-531] that the properties being acquired with the addition of those of the Brownmoor Oil Company previously acquired earned a total income for the month of July, 1928, of $354,-182.67.

The pro forma balance sheet certified to by the same firm of accountants [R. pp. 532-533-534] showed the condition of Italo after giving effect to the acquisition of the properties under contract of purchase. While the value placed upon the properties being acquired is greater than the par value of the stock being issued to acquire them the explanatory and qualifying comments of the auditors are such as to be in nowise misleading.

The brokers also examined into the Trumble refining process which Italo had an option to acquire subject to

tests financed by Italo and conducted by Trumble and considered it had favorable prospects. [R. p. 990.] Brown also had a discussion with Trumble concerning his process and secured a letter from him addressed to the Italo Company. [R. p. 1006—Exhibit QQ.]

It appears from the record that Italo had an option to purchase the Trumble patents to which reference is made in the minutes of a meeting of the directors of the corporation held August 17, 1928. [R. p. 244.] Robert McKeon in his testimony [R. pp. 1175-1176] refers at length to the experience of the company in testing Trumble's process for commercial use and the result thereof, stating that Italo still has whatever rights there were in the patents.

In addition to examining the information available the brokers considered that the company needed more representative and experienced management and insisted that John McKeon assume active charge. This McKeon was willing to do at a later date but could not get away from Richfield of which he was vice-president in charge of production until some time later. In the meantime he suggested associating William Lacy of Los Angeles whom he regarded as "a very good oil man" in the company and asking him to serve as president. Upon investigation the brokers considered the suggestion favorably. As testified by Shingle [R. p. 912] Mr. Lacy was very prominently identified with the business and public life of Los Angeles, being head of the Lacy Manufacturing Co., a director of the Farmers & Merchants Bank, a former president of the Chamber of Commerce, head of the Community Chest.

Mr. Lacy was already somewhat familiar with Italo, of which his brother-in-law, Fred V. Gordon, a former

official of California Petroleum Corporation, was vice president, and had, himself, subscribed $100,000 to the Shingle Syndicate and had borrowed $300,000 for Italo to meet the recent Graham-Loftus payment crisis. After a careful examination he consented to assume the Presidency which he did October 16, 1928. To show his faith in the enterprise he wished to acquire a block of stock and took an option from the Syndicate on 100,000 shares of common which he later exercised and paid therefor the sum of $100,000. Mr. Lacy also wished to surround himself with some of his business associates and brought with him to the Board of Directors William Chapin, Fred Keeler, Robert McLachlen and Hugh Stewart. Robert McKeon at this time took charge of the field operations.

This was the picture developed in the examination of the situation by the brokers before interesting themselves in the financing. As Brown testified:

> "About the middle of October, 1928, when Mr. Lacy and the other members of the board of directors were elected, I had and was receiving statements of the auditors, including the earnings of the properties. I had a long talk with Mr. Lacy in San Francisco, on October 16th, the day he was inducted into office as president, and he was highly enthusiastic over the situation. He stated he had made an investigation of the company on his own account, and likewise Fred Gordon, who was a vice-president of the company, and formerly vice-president of the California Petroleum Company. The picture was about this: The company, according to the statement of the auditors of the properties they were acquiring were earning about $354,000 a month in July; they had a production of thirteen to fourteen thousand barrels

of oil a day, practically all light oil, in the Los Angeles basin, and some in the San Joaquin Valley. They seemed to have assurance of good management through Mr. Lacy. In addition to this it looked like an extremely interesting speculative picture for the development of an oil company of considerable size. As a matter of fact, I think at that time it was the 9th, 10th, or 11th in size in California as a producer of oil." [R. pp. 998-999.]

In support of the statements made to the investigating brokers there is abundant evidence in the record as to the then value of the properties acquired, particularly as to the value and earnings of the McKeon and Graham-Loftus properties which constituted the principal acquisitions and which is fully set forth in the McKeon brief on appeal, so that only a brief reference to these points will be made here.

L. J. Byers, supervisor of accounting for the Italo receiver at the time of the trial, testified [R. pp. 850-851] that the McKeon properties for the two and a half months period from the time they were taken over, October 15, 1928, to December 31, 1928, brought in a gross income of $284,118.55 or net after operating expenses of $246,-176.41. The Graham-Loftus properties netted $1,233,000 in 1928, but were acquired earlier. In 1929 the McKeon properties netted $954,572.49 and the Graham-Loftus properties $1,336,535.34.

A report to the Board of Directors [R. pp. 252-253] by General Manager Robert McKeon shows gross income for the first four months of 1929 from oil and gas of $1,147,784.73 or an operating profit of $1,082,588.93, produced from 194 wells.

Government witness McLachlen, assistant secretary and employed in the land department of Italo, testified:

> "I was familiar with the holdings of the corporation. The company had approximately two hundred producing wells distributed over approximately 40 to 50 parcels of land. It had approximately 2000 acres of oil producing properties and approximately 40,000 to 45,000 acres of prospective oil properties. In New Mexico we had approximately 23,000 acres of prospective oil lands spread through approximately fourteen different counties along a major trend of oil fields that came in through Texas, through Mexico, and on into the panhandle of Texas, which I would consider prospective oil lands, and which was generally known among oil men as prospective oil lands." [R. p. 230.]

Concerning the manner in which the brokers pools handled the stock Shingle testified:

> "A stock market operation is where you sell through the medium of the stock exchange. You don't know who buys the stock. It is a demand which comes daily on the stock exchange for that stock. We were not proposing to create a swelled or false market price for the stock. We did not propose to sell the stock directly to the public but only through the stock exchange, and through stock exchange members. The stock at that time was listed on the San Francisco and Los Angeles Curb Exchanges." [R. pp. 910-911.]

In further reference to practices pursued in the stock exchange operations Shingle testified:

"Those are not the men who actually sell the stock over the counter. They sell the stock to pool members. We do not know where the pool members sell the stock; no one knows where they sell it. It is a clearing house, like a bank clearing house. In other words, we send a representative over to the Stock Exchange and there is an order in there to buy 5000 shares of stock or 10,000 shares or 500 shares, and there are probably sixty or seventy brokers on that floor. There were probably 72 different representatives on the floor. It is like any other commodity; it is nothing but supply and demand. Somebody wants to by 5000 shares and somebody wants to sell 5000 shares. * * * There is more distributing among the brokers than selling stock. For instance, during the month of December, 1928, we bought something like 179,000 or 180,000 more shares of stock than we ever really sold. As I remember it, the prices fixed by the syndicate manager for sale of the stock to the pool members fluctuated up for each 500,000 share lot. One pool would sell to another pool. The object of pools is to make profits, but they might make losses. Pool A might sell to pool B or to pool C and make a profit, and the pool members would derive a portion of whatever profit was made.

"So far as the market price is concerned, there is not the slightest difference between operations by a pool and a single broker. The only difference is that in a pool there are three or four or a half a dozen acting in concert instead of one. In marketing stock on the exchange there are certain brokers who have

orders to buy and other brokers who have orders to sell, and we sell stock only when there are more people buying than there are selling. With this pool that I had here, they simply had a contract with me as syndicate manager to option some of this stock that they knew they could get. Whenever there were more sales on the exchange than buys, I got rid of some of the syndicate stock. When other people who had bought stock but wanted to sell it to our pool, we had to buy that stock to maintain the market, and then resell that stock when there was an opportunity again. The syndicate stock simply went out as there was a surplus or excess demand over the outside supply, but of course the operators of the pool are always interested in trying to keep the price at a level. In that respect there is no difference between a pool and a single operator. The only reason for forming a pool is to get more people, to get more money, to get more responsibility back of it." [R. pp. 940-941-942.]

There is no evidence in the record that any of the brokers engaged in the market operation solicited sales through salesmen or otherwise and no evidence that they circulated or mailed any prospectus or other written matter or had anything whatever to do by suggestion or otherwise as to the information mailed by Italo to its stockholders.

The only piece of written matter introduced into evidence was a statistical summary of the Italo situation prepared by Brown which, after preparation, was approved by Fred V. Gordon, Vice-President of the Com-

pany. (Exhibit SS.) Concerning this matter Brown testified:

"In January, 1929, I came to Los Angeles and spent two or three days around the company's offices in getting general information. I had in mind at that time two things. I wanted to give the brokers who were interested what I found was a fair picture of the actual condition of the company, and also had in mind the financing of the company itself for two to two and a half million dollars bond issue. Mr. M. H. Lewis of M. H. Lewis & Company went over to the office with me. I spent a couple of days talking with the production department, and on the financial end, getting figures and facts together. I saw Mr. Lacy over there a number of times and talked with him about the condition of the company. He was very enthusiastic at the time. The company had production then of thirteen to fourteen thousand barrels, had about 12 sets of tools working drilling, only one of which was what is known as wildcat, and were expecting larger production. Mr. Lacy said he didn't think any more syndicate stock should be placed on the market at the time. He thought the stock would be worth $3.00 to $4.00 a share. He had just exercised his option at that time to buy 100,000 shares for $100,000. I also talked to Mr. Fred Gordon and he was equally enthusiastic, and was also enthusiastic over the eastern deal if it could be made on a proper basis.

"As a result of these conversations with Lacy and Gordon I made some pencil memorandums and went back and dictated this general memorandum and took it back to the office and had Mr. Gordon go over it as vice-president of the company and put his

name on the top as his approval. This is a copy of the statement that Mr. Gordon wrote his O. K. on." [R. pp. 1008-1009.]

Government witness Byers testified regarding this document:

"Exhibit 300 in evidence is similar to the usual forms used by brokerage houses for the purpose of furnishing information concerning securities that are listed on a particular exchange, of which that brokerage house may be a member, and in which trading takes place. Such statistical information is put out in forms similar to Exhibit 300 and left in the brokerage offices for the information of any persons who may come in with inquiries pertaining to that particular security. So far as I know that is all that was done with Exhibit 300. This other document that you have handed me is identical with Exhibit 300, except that it is put out by the firm of Plunkett-Lilienthal & Company of San Francisco, which firm were members of the San Francisco Stock Exchange and the San Francisco Curb Exchange." [R. pp. 682-683.]

Distribution of McKeon Escrowed Stock.

While the McKeon appeal brief deals extensively with the deposit in escrow and subsequent disposition of the Italo stock received by McKeon Drilling Co. we feel that some further facts should be presented in order to clarify the position of Shingle, Brown & Co., Inc., which acted as escrow holder and observed the directions of the McKeons in respect thereto.

The McKeon stock consisting of 3,440,000 shares of common and 940,000 shares of preferred was deposited

in escrow with Shingle, Brown & Co. October 26, 1928, pursuant to the request of the brokers' pool to insure against flooding the market with outside stock while they were engaged in financing the Syndicate's obligations to Italo. The written escrow instructions, calling for deposit for 90 days, directed to Shingle, Brown & Co., recite: "The purpose of and consideration for such escrow is the protection of the market operation in which you are engaged." [Ex. 98; R. pp. 328-329.]

This stock was deposited by McKeon Drilling Co. as its own property and held by Shingle, Brown & Co. subject only to the written instructions of the officers and agents of McKeon Company. Government witness L. J. Byers, former auditor for Shingle. Brown & Co., testified [R. pp. 465-466] that he supervised the escrow in the same manner as other trusts and escrows in the office of the firm and that the disbursements therefrom were made pursuant to instructions from McKeon Drilling Co. On this subject government witness Goshorn testified:

> *"From my examination of the escrow record I know that that stock was held by Shingle, Brown & Company solely as an escrow holder to be distributed by it pursuant to any instructions that were received by it from the McKeon Drilling Company.* I found from my examination of the books and records in evidence that the stock was distributed pursuant to written order given either by the McKeon Drilling Company or one of the three McKeon brothers, and that in each instance when any stock was distributed out of that escrow it was done pursuant to written order and a receipt was taken therefor." [R. p. 662.]

Orders for current and future disposition of the McKeon stock were several in number and varied in purpose and were as follows:

Direction November 13, 1928 [R. p. 348] to set aside 300,000 units for the Frederic Vincent & Co. settlement. Pursuant to this order and by written direction December 12, 1928 [Ex. 104; R. p. 331] there was sold 46,819 shares of common and 66,819 preferred to Frederic Vincent & Co. for $86,310.40 which was so done and the proceeds paid to McKeon Drilling Co. On December 18 an additional 198,735 shares of common and 196,035 shares of preferred were deposited with Bank of Italy to cover Frederic Vincent & Co.'s installment sales. Of such deposit 125,000 shares of common and 125,000 shares of preferred were without cash consideration. The remainder—73,735 common and 71,035 preferred—was sold to Frederic Vincent & Co. and pursuant to order of McKeon Drilling Co. [Ex. 112; R. p. 334] the proceeds received in February, 1929, distributed in equal fourth parts to McKeon Drilling Co., E. Byron Siens, A. G. Wilkes and Shingle, Brown & Co.

Direction November 21, 1928 [Ex. 102; R. p. 329] to deliver 500 units to Maurice C. Meyers, Trustee, to reimburse him for a like number of shares deposited in Farmers & Merchants Bank for International Securities' account.

Direction November 21, 1928, to sell sufficient shares to net $125,000 to be paid to Italo to settle an old lease account of the McKeons with Italo. This stock was not sold as the brokers were then engaged in financing Italo and the McKeons later settled with Italo by delivering to it a block of stock of $125,000 market value. [Ex. 103; R. p. 330.]

Direction December 17, 1928 [Ex. 106; R. p. 332] to deliver 250,000 shares upon termination of the escrow to J. B. deMaria upon payment therefor for McKeon account of $200,000. Of this amount $50,000 was received by the escrow holder and paid to McKeon Drilling Co., which later made its own delivery to and adjustment with deMaria.

Directions December 22, 1928, to deliver stock at the termination of the escrow as follows:

To Maurice C. Meyers, 62,500 shares preferred, 62,500 shares common. [Ex. 74; R. p. 296.]

To J. M. Perata, 62,500 shares preferred, 62,500 shares common. [Ex. 108; R. p. 333.]

To Paul Masoni, 62,500 shares preferred, 62,500 shares common. [Ex. 105; R. p. 331.]

To J. V. Westbrook, 25,000 shares preferred, 25,000 shares common. [Ex. 107; R. p. 333.]

To E. Byron Siens, 30,036 shares preferred, 34,362 shares common. [Ex. 109; R. p. 333.]

To Fred Shingle, 961,510 shares common. [Ex. 110; R. p. 333.]

It was directed by McKeon Drilling Co. that when the foregoing stock should be delivered the escrow holder should secure from each recipient "a letter acknowledging receipt of such stock from us in consideration of services in organizing, financing or otherwise promoting the interest of the Italo Corporation of America."

Concerning the reasons for the foregoing language Robert McKeon testified [R. p. 1158] that McKeon Drilling Co. wanted some form of receipt that would satisfy the income tax department when it became nec-

essary to account for stock received and disbursed and he adopted the form prepared by counsel in obtaining a complete release from Frederic Vincent & Co. as shown in Exhibit H.H.H.

The directions contained in Exhibit 110; R. p. 333, *supra,* directed also the return to McKeon Drilling Co. on expiration of the escrow of the balance of its stock amounting to 1,860,573 shares of common and 309,110 shares of preferred.

All of the directions given, except as otherwise indicated above, were complied with and the attention of the court is especially called to the letter of accounting dated April 26, 1929, directed to McKeon Drilling Co. and signed by auditor L. J. Byers for Shingle, Brown & Co. [Exhibit 123; R. pp. 354-355-356.]

An examination and analysis of the orders given and the accounting made will show *that if any conspiracy did exist among other persons as charged in the indictment* whereby McKeon Drilling Co. was to receive only 2,000,000 shares of stock for its properties and 2,500,000 shares was to be distributed to other persons without consideration, such a conspiracy was not within the purview of Shingle, Brown & Co. as the escrow holder as far as any relation of the amount of stock ordered delivered without money consideration bears to 2,500,000 shares.

The stock so ordered issued without money consideration includes the Meyers, Perata, Masoni, Westbrook, Siens and Shingle stock, plus the 250,000 shares to Vincent without cash consideration, plus three-fourths of the 144,770 shares placed in Bank of Italy for sale to Vin-

cent with directions that three-fourths of the proceeds should be paid to Siens, Wilkes and Shingle, Brown & Co. This amounts to a total of 1,809,486 shares, including 1,388,674 shares of common stock and 420,812 shares of preferred stock.

Concerning the stock ordered to be delivered to Shingle, its purpose, consideration and disposition, further reference will be made.

Brown testified [R. pp. 995-996] that he was given the foregoing orders, dated December 22, 1928, on the day they were made at Los Angeles and was told the reasons for them—that Perata and Masoni were given stock because they were being moved out of official positions which they had long held and their good will with a large group of Italian stockholders was sought in connection with John McKeon's plans to build a larger oil operation; that the Westbrook stock was a personal matter between John McKeon and Westbrook; that Meyers' stock was in appreciation for his services as an attorney beyond any means of cash compensation; that Siens' stock had to do with personal relations of Siens and John McKeon who were partners in some large real estate transactions and in a horse breeding farm.

Brown also testified [R. p. 997] that the receipt of the orders was the first information he had of such intended distribution.

That the reasons for such distributions as told Brown at the time the orders were given were the reasons in the mind of John McKeon is testified at considerable length by Mr. McKeon [R. pp. 1219-1226] to the effect that

Perata and Masoni were given stock to hold their good will and that of a large body of Italian stockholders in respect to the proposed expansion of Italo, that stock and money delivered to Siens were to finance John McKeon's San Bernardino building operations and not for Siens' personal benefit and that Meyers was given stock for his work at the suggestion of Robert McKeon. He further testified [R. pp. 1242-1244] concerning the stock delivered to Westbrook as a guarantee of a settlement of a money controversy between Westbrook and Siens, which was confirmed by Westbrook. [R. pp. 800-801.]

In a letter written March 11, 1929 [Exhibit 116; R. p. 336] to Shingle, Brown & Co., Robert McKeon complains of a bill for $954.94 for revenue stamp transfer charges, encloses a check for $400 "in payment for the revenue stamps on the 2,000,000 shares that were actually received by the McKeon Drilling Co." and adds "as you are aware the balance of the stock was placed in the name of the McKeon Drilling Co. only for the convenience of other interested parties. Each party interested should pay for the stamps used on that proportion of the stock which he received."

The statement in the letter 2,000,000 shares received by McKeon Drilling Co. bears no comparable relation to the directions given the escrow holder for disposition of stock and the accounting therefor in Exhibit 123 [R. pp. 354-355-356] and Shingle without reading its contents ordered the payment to settle a controversy, which had been going

on for some time between Byers as auditor for Shingle, Brown & Co. and Thackaberry as secretary of McKeon Drilling Co. See Exhibits 111, 115, 116 and 117. On this matter Shingle testified:

> "With respects to Exhibit 111, 115, 116 and 117, I have seen those letters before. They refer to expenses on stamp taxes for stamps on the McKeon stock and the amount of the bill was some nine hundred odd dollars, and the reference to the stock being transferred was the transfer from the McKeon escrow stock in accordance with the request that Horace Brown brought to me in December. On March 11, 1929, the date of Exhibit 116, Horace Brown was not in San Francisco. I wrote 'O. K., F. S.' on Exhibit 116. The circumstances of the receipt of Exhibit 116 and my putting 'O. K., F. S.' on there are as follows: There had been a controversy between Bob McKeon and our office over the stamps. I knew of the existence of those letters, and one day Mr. Byers came into my office and told me that he had just received a check from the McKeon Drilling Company for a part of those stamp taxes, and that they were still complaining that they should not pay them all, so he told me the amount in dispute was around about $500, and I said, 'All right, O. K., go ahead and pay it,' and I remember putting that on there. I do not have any recollection of reading the letter. The first time I recall seeing it was when it was put in evidence here. I know nothing now and did not know anything about the representation or the contents of that letter other than the fact that it recited a remittance of $400, and kicking about the balance of it when I O. K.'d it." [R. pp. 925-926.]

Brown testified regarding this matter:

> "I never saw Exhibit 116 until it appeared in the court room. I did not have any knowledge or information in March, 1929, that the McKeon Drilling Company stock, amounting to 2,500,000 shares, had been distributed to other persons. On the contrary, it was around 2,000,000 shares or less, as far as our escrow instructions went." [R. p. 1012.]

Robert McKeon testified at considerable length concerning his reasons for writing the letter and the language adopted by him therein [R. pp. 1153-1156] to which attention is respectfully called.

Shingle-Brown Compensation.

In respect to the 961,510 shares of common stock directed to be delivered to Fred Shingle upon termination of the escrow, Brown was advised when handed the order upon Shingle, Brown & Co., that the stock was to be placed at the direction of A. G. Wilkes to be used by him for compensating Shingle, Brown & Co. and for further use by him in working out John McKeon's plans for a larger oil company. Upon receipt of the instructions Shingle consulted with Wilkes and was told that the latter intended to use some 112,500 shares to keep Vice-President Gordon interested in the new company and for Howard Shores and that thereafter Shingle should keep half of the stock and Wilkes would use the other half. Shingle thereupon reduced the understanding to writing [Exhibit 110; R. p. 344] and at the termination of the escrow received for himself and the members of his firm approximately 450,000 shares of common stock.

It will be remembered that Shingle and Brown are not charged in the indictment and are in fact specifically excluded from any charge that they participated in any secret agreement relating to the issuance of the McKeon stock. That Shingle and his firm gave valid consideration for the stock received by Shingle is affirmatively shown by the record and stands undisputed by any evidence therein.

With a desire to repeat as little as possible facts set forth in the McKeon brief it will be necessary to go back to the period immediately following September 20, 1928, when Frederic Vincent & Co. having fallen down on their contract to provide funds, $600,000 was borrowed by Shingle, Lacy, John McKeon and others to meet a crisis in Italo financing and Shingle and Brown were urged by John McKeon and Wilkes to devise means of saving the situation.

In this crisis John McKeon, who had guaranteed the payment of the $600,000 in notes and testified [R. pp. 1210-1211] that he felt responsible for around 75 per cent of the money in the syndicate told Brown [R. p. 986] "if we could do so he would see we were not sorry for it," and that Wilkes also joined in such assurance, concerning which Brown testified:

> "Our conversations with Mr. Wilkes were along the same lines, asking us if we would get together on this thing. He said if we would he would see that we were substantially rewarded somewhere along the line for our services, if we could pull this thing through." [R. p. 989.]

On this subject Shingle testified:

> "Prior to that time Wilkes told us that if we would get into the matter he would see that we would be compensated, so that we had that assurance from both John McKeon and Wilkes." [R. p. 911.]

Confirming this fact John McKeon testified:

> "Shortly prior to October 16, 1928, at the time I told Wilkes to settle with Vincent, I also told him to use what stock was necessary to get stronger financial firms in to handle the situation. I told him I would go on that as far as we had to go to get that support." [R. p. 1216.]

Wilkes testified:

> "About the time the brokers agreed to take on the financing of the company, Jack McKeon told me that I could tell Shingle and Brown that if they took hold of the situation and cleaned it up and got these properties paid for and got the company in financial shape and raised the three and a half million dollars that was necessary that he would see that they got some compensation." [R. p. 735.]

And in connection with his testimony that he and his brother Raleigh had agreed to permit John McKeon to use stock received by McKeon Drilling Co. for various purposes, Robert McKeon testified:

> "With reference to reimbursing Shingle-Brown for their efforts which had been made and were to be made in regard to this other financing, I don't believe at that time there had been any definite amount of stock agreed up(on) at least I have not heard of any definite amount. To some extent they were to receive some of the stock." [R. pp. 1147-1148.]

While it was agreed by all persons testifying in relation thereto that no definite amount of compensation had been agreed upon it is clear that such assurances were given and that Shingle and Brown did organize the brokers' pool which carried the syndicate financing of Italo to a conclusion.

At about this time John McKeon and Wilkes were laying plans for the further expansion of Italo to include other large producing companies to be financed by eastern capital which Wilkes had contacted in New York during his visit in August and September and John McKeon who was preparing to leave Richfield was to head the consolidated corporation. John McKeon thereupon made arrangements with his brothers, Robert and Raleigh, to use up to 2,500,000 shares of Italo stock belonging to McKeon Drilling Co. in any manner he saw fit to advance his plans. [R. p. 1147.]

Shingle and Brown at this time were called upon for further services in connection with this proposed financing. Shingle testified [R. pp. 918-919] that the subject was first called to his attention late in October or November, 1928, when a Mr. De Shadney, representing eastern financial interests, came to the coast to examine into the proposed transaction. The deal contemplated the acquisition of various important properties aggregating about $30,000,000 and as a part of the financing it was proposed to issue $10,000,000 of bonds of which it was essential that western brokers should handle half but without participation in a stock bonus which the eastern underwriters expected to exact. Shingle and Brown agreed to handle $5,000,000 of the bonds, as confirmed by their own testimony, that of Wilkes [R. p. 736] and John

McKeon [R. p. 1235]. Discussions of plans concerning the formation of the larger company continued through several months, Shingle and Brown taking a part therein and maintaining their agreement to assist in the financing.

The first compensation received by Shingle, Brown & Co. was December 14, 1928, when McKeon Drilling Co., having received a check for $86,310.40 from the sale of a block of stock to Frederic Vincent & Co., gave them a check for one-fourth the amount, concerning which Brown testified [R. p. 1003] he was told by Robert McKeon it was a part of his appreciation for what Shingle, Brown & Co. had accomplished.

The syndicate, through the efforts of Shingle and Brown in organizing the brokers' pools, settled its obligations to Italo under its stock purchase contract December 20, 1928, and on December 22, 1928, Brown was given the instruction of the McKeons regarding the 961,510 shares to be placed at the disposition of Wilkes. Shingle [R. pp. 919-920] testified that in respect to this stock Wilkes told him it was to be employed where he thought best to further the big deal which he believed to be near consummation and that his division of the stock with Shingle was for what Shingle had done in the financing of Italo through the brokers' pools and for his commitment to take $5,000,000 bonds of the proposed new company.

Brown testified [R. pp. 1004-1005-1006] that the McKeons had told him this block of stock was to be placed at the direction of Wilkes to be used by him in compensating Shingle, Brown & Co. and in forwarding the McKeon Oil Co. picture; that in arranging a division of the stock Wilkes "told us at the time that the stock was

in compensation for the services we had performed in getting this deal through when it looked very bad and also for and standing in line for the larger picture" and further testified:

> "I had had no prior definite arrangement with any one of the McKeons or Mr. Wilkes that we were to receive any definite amount of compensation for the services Shingle, Brown & Company rendered in connection with straightening out the financial matters of the Italo Petroleum Corporation of America. At the time of this conversation with Mr. Wilkes, we had already agreed with Mr. De Shadney, Mr. Pass and given Mr. Wilkes our assurance that we would stand by on the bond financing of the eastern picture, which they had told us might run as high as ten million dollars, and we would be expected to handle about half of it on the coast. I considered that the stock which we received from the McKeons was compensation for what we had done in the past and what we were to do in the future. I considered the compensation very substantial, but it represented about ten per cent of the McKeon Drilling Company's stock, which I did not consider an excessive cut in consideration of what we had done and were prepared to do." [R. pp. 1005-1006.]

John McKeon, who directed the disposition of the stock, testified:

> "With reference to the entries on Exhibit 297 showing approximately 450,000 shares of common stock going to Shingle, Brown & Company out of the McKeon escrowed stock, *I figured that Shingle, Brown & Company were very well entitled to it, because I realized that if it had not been for the assistance of Brown and Shingle in September or early*

in October that our whole project would have collapsed, and I realized at that time that Italo stock, unless the financial program was worked out, wasn't worth anything, that it would be selling for ten cents a share or less I realized all of those things at the time I agreed to give them the stock. That was at the time I agreed to use the stock and settle with Vincent. I agreed to it as an inducement to the other brokers. There was no specification as to the amount of stock they were to receive, and we all figured that it would be a very hard job, and nobody contemplated that the money would come into the syndicate and that the sale of stock would be as rapid as it was. We contemplated that we had a year's or a half year's work ahead, and they completed it in approximately sixty days. That was after the company was reorganized and Mr. Lacy put in and the stock went overnight.

"I also knew in December, 1928, that Shingle, Brown & Company had verbally agreed that they would finance one-half of the $10,000,000 bond issue that was then proposed and that agreement was all made and entered into before I decided how much stock I was giving them." [R. pp. 1234-1235.]

The projected eastern deal made further progress and Shingle and Brown kept in touch with it. Early in 1929 the proposed deal, called for cash requirements of $15,500,000 and stock to the amount of $19,750,000 as indicated by a telegram sent to Palmer & Co. [Exhibit R. R.; R. pp. 1007-1008.] This was followed by a visit to the coast of a Mr. Lyons representing Palmer & Co. to whom Shingle and Brown offered their further pledge

to handle $5,000,000 bonds of the new company and concerning which Brown testified:

> "Mr. Lyons had told me in the presence of Jack McKeon and A. G. Wilkes in Los Angeles that there was no question at all about the deal going through, and Jack McKeon was going east with him and it would be closed up very quickly. He indicated the amount of the bond issue would be determined, that they would handle $10,000,000 in bonds, and I told him we could handle about half of them on the coast.
>
> "With respect to Shingle, Brown & Company receiving any portion of the stock bonus that was to be issued to the eastern bankers for the financing of the bond issue, I told him I presumed the eastern bankers would want the stock bonus. I asked him if we would have any interest in that and he said no, that the eastern bankers would handle that entirely back there, that we could handle some of the bonds. We had already been compensated and I said we would do so to the limit of our ability.
>
> "In order to get in a financial position to handle these bonds we sold stock over a period of three months ourselves, a few thousand shares at a time so as not to disturb the market, and placed ourselves in a financial position to handle the bonds." [R. p. 1010.]

Shingle [R. pp. 920-921-922] also testified at length regarding the further progress of the eastern deal, the continued commitment of his firm to take $5,000,000 bonds, and the sale over a period of the stock received by him in order to get in a position to carry them.

For reasons connected with increasingly critical times leading up to the market crash of the fall of 1929 the projected deal was not consummated and Shingle testified:

> "The McKeon deal did not go through and we didn't give back the 450,000 shares because we had performed a pretty good service and saved this company once, and I think that compensation was given to us for that, probably more or as much anyway as standing by and helping finance in the future. We would expect pay for something we did and we didn't get paid until after we had done the job." [R. p. 935.]

It appears from the record that from all transactions hereinabove stated Shingle, Brown & Co. received $578,-260.03 which government accountant Goshorn described on his charts and in his testimony as bonus as without consideration and as net income. In cross-examining Goshorn, counsel for Shingle and Brown, asked:

> "Now, do you know from an examination of any of these books and records in evidence that during the year 1929 that the detailed earnings of Shingle-Brown were $1,229,692.09; that after deducting their expenses, operating expenses and other expenses, it left a net profit for that year of $397,840.29." [R. p. 664.]

The government counsel objected and the court refused to permit cross-examination tending to show the value of services performed as to expense incurred by Shingle, Brown & Co. in gaining such compensation. [R. pp. 664-670.]

In cross-examinination of Goshorn, recalled by the government as a rebuttal witness [R. pp. 1255-1256], coun-

sel for Shingle and Brown again endeavored to bring out that the transactions were part of many large business operations of Shingle, Brown & Co. in the year 1929 and did not reflect net profit to which the court sustained the objection of government counsel.

Twelfth Count Letter.

As previously stated Shingle and Brown were both convicted only on count 12 of the indictment which alleges that, for the purpose of executing a scheme and device to defraud Italo and its stockholders, *Shingle mailed a letter at San Francisco* addressed to O. J. Rohde.

In considering what part this letter could possibly play in the execution of any scheme or device whatever, *it must be recalled that Shingle and Brown are clearly excluded in the charges contained in the indictment and bill of particulars with any participation in the transaction by which McKeon Drilling Co. sold its properties to Italo at an alleged excessive price and subject to a secret agreement to divide a portion of the proceeds with those who caused the transaction. They were acquitted by the jury on the 15th count which generally charges a conspiracy in relation to the distribution of the McKeon stock.*

The relation of the syndicate to Italo is shown by the evidence, which is undisputed, to be that of a purchaser of a block of Italo's stock, bought and paid for at a fair net price, the syndicate in every way performing its obligation to Italo, If, as charged, and as fully supported by evidence, Shingle and Brown had no part in devising the McKeon transaction the syndicate could not have been a part of such a scheme as far as they were concerned.

The syndicate completed its payments to and received a complete acquittance of its obligations from Italo December 20th, 1928, and on that date became the owner and holder of all the unsold stock placed in escrow subject to the fulfillment of such obligations. Thereafter the syndicate was simply a stockholder of Italo, accountable only to its members and to no other person, firm or corporation.

The letter of Shingle to Rohde, a member of the syndicate, is dated January 23, 1929, *a month after the conclusion of the syndicate's business with Italo,* and in full is as follows:

"Dear Mr. Rohde:

"In reference to your participation in the Italo Syndicate, it is impossible at this time to state definitely when you can be paid out in full, but I am liquidating as fast as the market will warrant, and am in hopes that everything can be accomplished before many more months pass.

"As regards profit in the deal, this also is hard to estimate until further liquidation is accomplished.

"As soon as anything transpires of interest to participants I will immediately advise you.

"Very truly yours,

"FRED SHINGLE,

"Syndicate Manager."

[R. p. 581.]

This letter is in reply to a letter from Rohde to Shingle dated December 29, 1928, in which Rohde acknowledges receipt of the repayment of a portion of his subscription and inquires when further payments will be made. [Exhibit 288; R. p. 580.]

Shingle's letter contains no representations whatever concerning Italo *and relates entirely to the business affairs of the syndicate with a syndicate member.*

Witness Rohde testified [R. pp. 577-583] that he subscribed $5000 to the syndicate at the suggestion of E. Byron Siens. He received a receipt therefor and a copy of the Syndicate Agreement. He received a letter dated December 21, 1928, signed Fred Shingle, Syndicate Manager, by L. J. Byers, stating that the syndicate had discharged its entire obligation to Italo, enclosing a check for $1750, and advising him further funds would be forwarded when available. [Exhibit 288; R. pp. 580-581.] To this letter Rohde replied, making the inquiry which prompted Shingle's reply in the form recited.

Dated January 31, 1929, and March 7, 1929, Rohde received form letters enclosing further cash distributions to members of the syndicate. [Exhibit 289-290; R. p. 582.]

Dated July 10, 1929, Rohde received a form letter signed Fred Shingle, Syndicate Manager, by Horace J. Brown, extending the term of the syndicate, which is the

letter set forth in the 13th count of the indictment upon which appellants were acquitted.

Dated January 4, 1930, Rohde received a letter advising him of the conclusion of the syndicate, enclosing a copy of an audit of the syndicate affairs by Lybrand, Ross Bros. & Montgomery, and pursuant to its instructions called at the Farmers & Merchants Bank and received an additional cash distribution and his ratable share of the Italo stock held by the syndicate.

There is nothing in witness Rohde's testimony of criticism or complaint of the conduct of the syndicate and nothing to show that anything concerning it was misrepresented to him. He testified that he went into the syndicate thinking he would profit thereby.

None of the seventy-odd subscribers to the syndicate were produced by the government to complain of the conduct of the syndicate or to impugn the motives of Shingle, its manager. *The indictment does not allege any scheme to defraud syndicate members, but merely that the syndicate members, of which Rohde was one, were guilty of fraud because they expected to make a profit from syndicate operations.*

In what manner the letter written by Shingle to Rohde, exclusively concerning syndicate affairs and made the subject of count 12 on which both Shingle and Brown were convicted, could have been mailed to execute a scheme and artifice to defraud Italo and its stockholders does not appear from the evidence.

Officers and directors of Italo who were subscribers to the syndicate included Perata, Masoni, Siens, Gordon, Lacy, De Maria, Rolandelli, Tomassini, Pizzi, De Pauli, Quillici, Keeler, Chapin and Stewart.

Although the indictment charges the syndicate *as a part of a scheme to defraud Italo* and specifically refers to the connection therewith of officers and directors of the corporation, it should be observed that directors Gordon, Lacy, Rolandelli, Pizzi, De Pauli, Quillici, Keller, Chapin and Stewart were not indicted; that deMaria was dismissed at the conclusion of the government case on motion of the government; that Tomassini was dismissed by order of the court at the conclusion of the defense case and that Perata and Masoni were convicted only on the 15th or conspiracy count.

In view of these facts it does not appear that the syndicate operation was considered by either court or jury as a part of any scheme to defraud and further supports the contention of appellants Shingle and Brown as shown by the record that a letter written by Shingle alone solely in reference to the affairs of the syndicate and made the basis of count 12 upon which both Shingle and Brown were convicted could not have been in execution of any scheme or device to defraud.

SPECIFICATION OF ERRORS

I.

The court erred in overruling appellants' demurrer to and in denying their motions for directed verdicts of not guilty and that judgment be arrested upon the twelfth count of the indictment, made upon the ground that the twelfth count did not allege facts sufficient to constitute a public offense within the jurisdiction of the United States District Court for the Southern District of California.

This specification of error is based upon the error of the court in overruling appellants' demurrer to the twelfth count [Assignment of Errors Nos. 1, 5 and 6, R. pp. 1391 to 1392 and R. p. 138], in denying appellants' motion for a directed verdict of not guilty [A. E. 17, R. p. 1403 and R. p. 690] and in denying appellants' motion in arrest of judgment [A. E. 14 and 15, R. pp. 1357 and 1403].

II.

The court erred in instructing the jury that appellants could be convicted under the twelfth count of the indictment by finding "that the defendants on or about the 23rd day of January, 1929, for the purpose of executing the scheme described placed in the United States Post Office in San Francisco, a postpaid envelope addressed to O. J. Rohde at Los Angeles, California, containing a certain letter dated January 23, 1929, and which has been admitted in evidence as Exhibit No. 234." (A. E. 99.) [R. pp. 1531-2.]

III.

The court erred in instructing the jury "that the person guilty of its violation must first devise or intend to devise a scheme or artifice to defraud or to obtain money or property by means of false or fraudulent pretenses, representations or promises, and secondly, for the purpose of execution such scheme or artifice or attempting so to do, place or caused to be placed any letters, circulars, or advertisements in the post office to be sent or delivered by the post office establishment." [R. p. 1280.]

IV.

The court erred in instructing the jury as follows: If you find from the testimony introduced in this case that the letters in question passed through the mail, and that they were placed in the mails by the agents or clerk of the defendants, acting within the scope of their employment and in the usual course of business, the defendants caused the letters to be placed in the post office to be sent or delivered, within the meaning of the mail fraud statutes. [A. E. 102; R. pp. 1533-1534. Exceptions p. 1327.]

V.

The court erred in admitting in evidence against appellants Shingle and Brown, over their objections and in violation of the allegations of the indictment and the bill of particulars, the testimony of the witness Goshorn, the summary prepared by him, Exhibit No. 297, and the books and records upon which said testimony and exhibits were based for the purpose of proving that these appellants were parties to an alleged "secret arrangement and agreement" to receive as "secret profits" a part of the stock consideration paid by Italo for the McKeon Company's assets and the proceeds from the sale of said stock.

This specification of error is based upon Assignments of Error Nos. 47, 47-a, 47-b, 47-c, 47-d; R. pp. 1447 to 1460, the evidence being contained in the Bill of Exceptions, R. pp. 589-608.

VI.

The court erred in failing and refusing to instruct the jury, as requested by appellants Shingle and Brown, that the jury was not to consider any evidence as proving that said appellants had knowledge of or participated in transactions when they were excluded from such participation in the indictment and bill of particulars.

This specification of error is based upon the refusal of the court to give a series of instructions requested by appellants Shingle and Brown with respect (1) to the nature and effect of the bill of particulars as restricting the proof of the government, and (2) to the consideration

of evidence with respect to appellants as to transactions and those "parts" of the scheme to defraud when the indictment and bill of particulars specifically excluded them from knowledge of or participation therein.

All of said requested instructions were refused and exceptions taken. [R. p. 1304.] Such refusals are the basis of the following Assignments of Error:

1. Requested instructions as to general effect of Bill of Particulars. (Assignment of Error No. 70.) [R. pp. 1404-5.]

2. Requested instructions to the effect that Shingle and Brown were excluded from participation in organization of Italo-American and Italo-Pete and the control of said corporations. (Assignments of Error Nos. 71, 72, 73.) R. pp. 1505-7.]

3. No evidence that Shingle and Brown received a bonus from Italo-Pete for participating in the $80,000 loan. (Assignment of Error No. 74.) [R. p. 1507.]

4. Shingle and Brown excluded from causing the execution of the Italo-Brownmoor contract and issuance of stock for the Brownmoor assets. (Assignments of Error Nos. 75, 76 and 77, 78.) [R. pp. 1507-1510.]

5. Shingle and Brown excluded in indictment and bill of particulars from participation in the purchase by Italo of the McKeon assets, viz.:

   (a) Did not cause execution of Italo-McKeon contract. (A. E. No. 79.) [R. p. 1511.]

   (b) No dealings with the Corporation Commissioner. (A. E. No. 80.) [R. pp. 1511-1512.]

(c) Shingle and Brown not parties to "secret arrangement and agreement" for distribution among defendants of 2,500,000 shares of stock received by McKeon Company from Italo. (Assignment of Error No. 36.) [R. p. 1435.] [R. pp. 319-321.] (Assignments of Error Nos. 81 and 82.) [R. pp. 1513-1514.]

(d) No participation by Shingle and Brown in receiving, selling, or profiting from sale of stock "received . . . under said secret arrangement and agreement." (Assignment of Error No. 83.) [R. p. 1514.]

The instructions with respect to the effect of the bill of particulars on the indictment which were requested, refused and exceptions taken [R. 1304-1313] and which are hereinabove referred to and epitomized are as follows:

[A. E. 70; R. 1504]: "You are instructed that a bill of particulars has been furnished to the defendants in this case, by order of this court. The purpose of a bill of particulars is to advise the court, and more particularly the defendants, of what facts, in more or less detail, the defendants will be required to meet upon the trial of a case, and the Government is limited in its evidence to those facts so set forth in the bill of particulars, as having been done or committed by any particular defendant. When furnished a bill of particulars it concludes the rights of all parties to be affected by it, and the Government in this case must be and is confined to the particulars they have specified in the bill of particulars as having been done or said by any of the particular defendants. The mere fact, however, that the Gov-

ernment states in the bill of particulars that any particular defendant or defendants did engage in any of the transactions therein alleged is not to be considered by you as any evidence whatsoever that such defendant or defendants did engage in such transaction; but it must be proven by the evidence to your satisfaction beyond a reasonable doubt that such defendant did knowingly participate in such transaction.

However, the Government is limited and restricted in its evidence to the particulars specified in the bill of particulars and is not permitted to prove that any defendant or defendants not named in the bill of particulars as having engaged in a particular transaction did engage therein. In other words, the effect of the bill of particulars in this regard, is that the Government says that under the evidence the particular defendant did not engage in the particular transaction not specified as having been engaged in by him."

[A. E. 71; R. 1505]: "You are instructed that there is no evidence in this case, that the defendants, Fred Shingle, Horace J. Brown, or Axton F. Jones, or either or any of them, had knowledge of, or participated in the organizing of the Italo American Petroleum Corporation, or participated in the issuing, or selling, of the capital stock of the said Italo American Petroleum Corporation."

[A. E. 72; R. 1506]: "You are instructed that there is no evidence in this case that the defendants, Fred Shingle, Horace J. Brown, or Axton F. Jones, or either or any of them, organized, or caused the organization of, the Italo Petroleum Corporation of America, or that they issued, or caused to be issued, the capital stock of the said Italo Petroleum Corporation of America."

[A. E. 74; R. 1507]: "You are instructed that there is no evidence in this case that the defendants, Fred Shingle, Horace J. Brown, or Axton F. Jones, or either, or any of them, on or about May 16, 1928, loaned to the Italo Petroleum Corporation of America the sum of $80,000; nor is there any evidence that they, or either of them, received, from the Italo Petroleum Corporation of America, a bonus for the making of a loan of $80,000 to the said Italo Petroleum Corporation of America."

[A. E. 75; R. 1508]: "You are instructed that there is no evidence in this case that the defendants, Fred Shingle, Horace J. Brown, or Axton F. Jones, or either or any of them, caused the Italo Petroleum Corporation of America to enter into an agreement for the purchase of the assets of the Brownmoor Oil Company. There is no evidence that they knew what the terms or provisions were that were to be contained in any agreement between the said Italo Petroleum Corporation of America and the said Brownmoor Oil Company or what consideration the Italo Petroleum Corporation of America agreed to pay for the assets of the Brownmoor Oil Company."

[A. E. 76; R. 1508]: "You are instructed that there is no evidence in this case that the defendants Fred Shingle, Horace J. Brown, or Axton F. Jones, or either or any of them, at any time filed or caused to be filed with the Corporation Commissioner of the State of California any application or applications for a permit or permits for the issuance to the Brownmoor Oil Company, or the stockholders of the Brownmoor Oil Company, of any of the stock of the Italo Petroleum Corporation of America, agreed by the Italo Petroleum Corporation of America to be paid by it as a part of the purchase price of the assets of

the Brownmoor Oil Company. There is no evidence that they, or either or any of them, had knowledge of, or participated in, any of the transactions had between the Italo Petroleum Corporation of America, and the Brownmoor Oil Company, or between either of said corporations and the Corporation Commissioner of the State of California respecting the purchase by the Italo Petroleum Corporation of America of the assets of the Brownmoor Oil Company."

[A. E. 77; R. 1509]: "That there is no evidence in this case, and you are not to consider any evidence in this case, as proving or tending to prove, that the defendants Fred Shingle, Horace J. Brown, or Axton F. Jones, or either or any of them, were directors of the Italo Petroleum Corporation of America, or that they caused the Italo Petroleum Corporation of America to enter into an agreement with the Brownmoor Oil Company providing for the purchase of the assets of the Brownmoor Oil Company by the Italo Petroleum Corporation of America or that they caused the Italo Petroleum Corporation of America to issue 600,000 shares of its preferred or 600,000 shares of its common capital stock as a part of the purchase price to be paid for the said assets of the Brownmoor Oil Company; or that they filed or caused to be filed with the Commissioner of Corporations of the State of California, an application for a permit to issue said 600,000 shares of the preferred or, 600,000 shares of the common capital stock of the said Italo Petroleum Corporation of America, as a part of the purchase price to be paid for the said assets of the Brownmoor Oil Company."

[A. E. 79; R. 1511]: "There is no evidence in this case, and you are not to consider any evidence in this case, as proving or tending to prove that the

defendants Fred Shingle, Horace J. Brown, or Axton F. Jones, or either or any of them, caused the Italo Petroleum Corporation of America to enter into an agreement with the McKeon Drilling Co., Inc., by the terms of which the Italo Petroleum Corporation of America agreed to purchase or did purchase certain assets of the McKeon Drilling Co., Inc., or that they or either of them caused said agreement to provide that an excessive consideration should be paid for said assets; or that they caused the issuance of, or the delivery to, the McKeon Drilling Co., Inc., of 4,500,000 shares of the capital stock of the Italo Petroleum Corporation of America as a part of the consideration to be paid for said assets of the McKeon Drilling Co., Inc."

[A. E. 80; R. 1512]: "You are instructed that there is no evidence in this case, and you are not to consider any evidence in this case, as proving or tending to prove that the defendants Fred Shingle, Horace J. Brown, or Axton F. Jones, or either or any of them, should, or that they did apply to the Commissioner of Corporations of the State of California for a permit to issue stock of the Italo Petroleum Corporation of America for the purpose of acquiring or purchasing the properties of various companies, including the properties of the McKeon Drilling Co., Inc.; there is no evidence that they, or either or any of them, should, or that they did, represent to the Commissioner of Corporations of the State of California in making said application, that the Italo Petroleum Corporation of America, had made an agreement with the McKeon Drilling Co., Inc., to issue or deliver to the McKeon Drilling Co., Inc., 4,500,000 shares of the capital stock of the Italo Petroleum Corporation of America as a part of the purchase price to be paid by it for the said properties of the McKeon Drilling

Co., Inc.; there is no evidence that defendants, Fred Shingle, Horace J. Brown, or Axton F. Jones, or either, or any of them at the time said application was filed with the Corporation Commissioner of the State of California, knew or intended that the McKeon Drilling Co., Inc., should or that it did receive only 2,000,000 shares of the said stock of the Italo Petroleum Corporation of America issued as a part of the purchase price for the assets of the McKeon Drilling Co., Inc."

[A. E. 81; R. 1513]: "You are further instructed, in accordance with the foregoing rules respecting the effect of bills of particulars, that there is no evidence in this case, and you are not to consider any evidence in this case, as proving or tending to prove that the defendants, Fred Shingle, Horace J. Brown, or Axton F. Jones, or either, or any of them, had any secret arrangement or agreement either among themselves or with any of the other defendants whereby they or any of the defendants, were to receive back, or did receive back, from the McKeon Drilling Co., Inc., 2,500,000 shares of the capital stock of the Italo Petroleum Corporation of America, issued by that company as a part of the purchase price for certain assets of the McKeon Drilling Co., Inc., either without the knowledge or consent of the stockholders of the Italo Petroleum Corporation of America, or without giving any consideration therefor."

[A. E. 82; R. 1514]: "You are further instructed that there is no evidence in this case, and you are not to consider any evidence in this case, as proving or tending to prove, that the defendants Fred Shingle, Horace J. Brown, or Axton F. Jones, or either or any of them, were parties to or had knowledge of any secret arrangement or agreement, if any there was,

whereby any defendant in this case was to receive back from the McKeon Drilling Co., Inc., all or any part of the 2,500,000 shares of the capital stock of the Italo Petroleum Corporation of America issued as a part of the purchase price for certain assets of the McKeon Drilling Co., Inc."

[A. E. 83; R. 1514]: "In accordance with the rules stated to you with respect to the effect of bills of particulars, you are further instructed that there is no evidence in this case, and you are not to consider any evidence in this case, as proving or tending to prove, that the defendants, Fred Shingle, Horace J. Brown, or Axton F. Jones, or either or any of them, should, or that they did sell, or cause to be sold to some of the persons designated in the indictment, as the persons to be defrauded, any stock of the Italo Petroleum Corporation of America, received by them from the McKeon Drilling Co., Inc.; or that any such stock was sold by them, if any was sold, was sold pursuant to any secret arrangement or agreement to which they were parties or of which they had knowledge."

[A. E. 84; R. 1515]: "You are instructed that there is no evidence in this case, that the defendants, Fred Shingle, Horace J. Brown, or Axton F. Jones, or either or any of them, sold or caused the selling of any stock issued by the Italo Petroleum Corporation of America as the result of any secret arrangement or agreement, of which they had knowledge, or to which they were parties. The mere fact that the said defendants may have received some of the shares

of stock issued by the Italo Petroleum Corporation of America as part of the purchase price paid by it for the assets of the McKeon Drilling Co., Inc., creates no presumption that it was issued to the said Fred Shingle, or Horace J. Brown, or Axton F. Jones, or that it was received by them, pursuant to any secret arrangement or agreement. You are instructed that there is no presumption that written instruments are without consideration. On the contrary, the law presumes that all parties are honest, that the usual course of business has been followed, and that a written instrument was executed for a valuable consideration, and that it is free from fraud."

VII.

The court erred in admitting in evidence against appellants Shingle and Brown, over their objections and motions to strike, the books and records of the Brownmoor Oil Company, the Italo-American Petroleum Corporation, the Italo Petroleum Corporation of America, McKeon Drilling Co. Inc. and John McKeon, Incorporated, of Lieb, Keystone and Bacon & Brayton, and International Securities Company, and the testimony and summaries Exhibits Nos. 297, 298 and 299 of the witness Goshorn based on such records.

This specification of error is based on the following numbered Assignments of Errors, the record page reference to the testimony, objections and motions to strike, being as hereinafter set forth.

1. **Brownmoor Records.**

(Assignment of Error No. 38.) [R. p. 1437.]

(Assignment of Error No. 43.) [R. p. 1444.]

Referring to the books of account being Exhibits 32-a and b and 147. [R. pp. 468 and 469; 368 and 650.] With objection interposed thereto and the ruling and exception [R. pp. 469 and 650] and the motion to strike, denial thereof and exception appearing at R. pp. 686 and 689, and minute book of said company, Exhibit 239, received over objection and exception. [R. pp. 560 and 561.]

The foundation evidence for the introduction of these records appears in the testimony of the witness Francis King. [R. pp. 467-469.]

2. **Records of Italo-American Petroleum Corporation.**

(Assignments of Error Nos. 23 and 24) [R. pp. 1404-1407] relating to Exhibit 3.

Minute Books, the objections thereto and rulings thereon. [R. pp. 191 and 192.]

Books of Account. Being Exhibits 5, 6, 8, 9, with the foundation testimony with respect thereto and the objections and rulings thereon appearing at R. pp. 198 to 202.

The foundation testimony for the admission of these exhibits was given by Courtney Moore, a director of the company [R. p. 197] and the bookkeeper, Ida M. Scat-

trini [R. pp. 198-203] and Emma Baldocchi [R. pp. 203-208].

The government accountant, James H. Hynes, testified with respect to the contents of these exhibits [R. pp. 191-208].

3. **Records of Italo Petroleum Corporation of America.**

(Assignment of Error No. 27.) [R. pp. 1410-1419.]

(Assignment of Error No. 28.) [R. pp. 1419-1423.]

Minute Books, Exhibits 16-A, B and C. [R. pp. 221-6.]

Objections and ruling [R. pp. 222-27] and motion to strike and ruling. [R. p. 236.]

Book of Account, Exhibits 28-A, B, C and D and 29, 31 and 33. [R. pp. 255-261.]

Objections and ruling. [R. pp. 261-264.]

Testimony of identifying witnesses to Minute Books, Robert McLachlin. [R. pp. 220-253.]

Books of account identified by the witnesses J. H. Jefferson [R. pp. 254-5]; J. S. Human [R. pp. 255-260]; I. V. Davis [R. pp. 260-265]; Ada B. Lyle [R. pp. 265-266, 283-301]; Ralph J. Sunderhauf [R. pp. 267-280.]

4. **McKeon Drilling Co. Records.**

Exhibits 86-a, b, c and d, 87-a and b, 89, 90, 91, 94.

(Assignment of Error No. 32.) [R. p. 1429.]

(Assignment of Error No. 33.) [R. p. 1431.]

Assignments of Error No. 34 and 35.) [R. pp. 1433-1435.]

Identifying witnesses, David C. Taylor [R. pp. 308-319]; E. A. Thackaberry [R. pp. 321-327].

Objections and ruling. [R. pp. 308, 309, 310, 314, 315.]

Motion to strike and limit testimony. [R. pp. 319, 320.]

Further objections and ruling. [R. pp. 323, 325, 333, 338, 339.]

5. **Records of Bacon & Brayton and Lieb, Keystone.**

(Assignment of Error No. 30.) [R. p. 124.]
(Exhibit 58.)

Objections and ruling. [R. p. 284.]

6. **Books and Records of John McKeon, Inc., a Corporation.**

(Assignment of Error No. 39.) [R. pp. 1438-39.]

(Exhibits 245-a, b and c.)

Objections and ruling. [R. pp. 479-481.]

7. **Books and Records of International Securities Co.**

(Exhibits Nos. 242 and 243.)

Objections and ruling. [R. p. 477.]

8. **Exhibits Nos. 297, 298 and 299 Are Testimony of the Witness Goshorn.**

Exhibit No. 297. (Assignment of Error No. 47.) [R. pp. 1447-1453.]

Objections and ruling. [R. pp. 589-608.]

Exhibit No. 298. (Assignment of Error No. 50.) [R. pp. 1468-1469.]

Objections and ruling. [R. pp. 631-633.]

Exhibit No. 299. (Assignment of Error No. 51.) [R. pp. 1471-1473.]

Objections and ruling. [R. pp. 634-641.]

Lengthy objections were interposed to the admission in evidence of the above described exhibits and testimony on the grounds that said records were incompetent, irrelevant, immaterial and hearsay, no proper foundation laid, not binding upon these appellants, and that the said books and records being books and records of corporations of which these appellants were not officers and directors; and there being no proof that they had knowledge of the entries therein, or access to said books and records, and they would not be binding on said appellants.

VIII.

The court erred in sending Exhibits Nos. 297, 299 and 155 to the jury room to be considered by the jury during its deliberations over appellants' objections that said exhibits contained matters that had not been received in evidence, which said matters should be deleted from said exhibits before the same were taken to the said jury room, and the said jury therefore received evidence out of court.

This specification of error is based upon the following assignments of error: Nos. 57 and 52, R. 1485 and 1474.

During the trial Exhibit No. 155, which purported to be a statement made by the defendant James V. Westbrook (who was acquitted) to officers of the Internal Revenue Bureau (respecting the income tax liability of appellant E. B. Siens), was received in evidence. The statement was made on or about November 12, 1929, after the termination of the alleged scheme and conspiracy and was therefore admitted as to the defendant Westbrook only. [R. pp. 435-6.] The statement was twelve pages in length and only that portion beginning on page one and ending on page eight with the words "Not that I know of" was received in evidence and read to the jury and the remainder thereof was stricken from evidence. [R. p. 436.] The portion of said exhibit ordered stricken from evidence is contained in the record [R. pp. 1335-1340] and relates to an alleged proposal by the defendant Siens to evade the payment of income taxes [R. pp. 1337-

1339], to the alleged building of a $100,000 yacht by the defendants Siens and Wilkes [R. p. 1336] and to the making of "large profits" by the "Shingle Syndicate." [R. p. 1339.]

Exhibits 297 and 299 were two large charts of dimensions of about 5 x 10 feet each. They purported to show the distribution of "bonus stock" issued by Italo Petroleum Corporation of America in acquiring the assets of the McKeon Drilling Company and the "realization" of the various defendants from this "bonus stock." It appeared on *voir dire* examination that none of the books and records in evidence described this stock as "bonus stock" [R. pp. 601-603] and the court ordered the word "bonus" stricken from said exhibits. [R. pp. 601-603; 629; 640-641.] However, the word "bonus" was not deleted from said exhibits. [R. pp. 595-598; 636-639.]

After the jury retired to deliberate upon its verdict the jury requested the court to send, and the court did send, Exhibits 155, 297 and 299 to the jury room without deleting therefrom those portions of Exhibit 155 which had been stricken from evidence, or the word "bonus" appearing on Exhibits 297 and 299, although appellants called said matters to the attention of the court and objected to said Exhibits being taken to the jury room without said matters being deleted therefrom. [R. p. 1335.] The objections interposed by appellants to these exhibits being taken to the jury room were overruled and exception taken. [R. pp. 1335, 1340.]

IX.

The court erred in refusing to permit cross-examination of the witness Goshorn with respect to his testimony to the effect that the stock and money alleged to have been "realized" by these appellants was "realized" without consideration and was net profit.

This specification of error is based upon Assignments of Error Nos. 49 and 68. [R. pp. 1462 and 1501.]

The government accountant Goshorn prepared Exhibit No. 297, purporting to be a "summary showing disposition of 3,500,000 shares of common stock and 1,000,000 shares of preferred stock 'Italo Petroleum Corporation of America' (per books and records) issued in acquiring property of McKeon Drilling Co., Inc.," and showing "realization from disposition of 3,500,000 shares common stock and 1,000,000 shares of preferred stock of Italo Petroleum Corporation of America (per books and records) issued in acquiring the properties of the McKeon Drilling Co., Inc." [R. pp. 595, 598.] He described this stock as "bonus" stock [R. pp. 595-597, Items 16-55] and stated that Shingle, Brown & Co. "realized" $578,-260.63 [R. p. 598] from the disposition of a portion thereof. He further testified that the "realization" of $578,260.63 was "taken into the profit and loss account of Shingle, Brown & Co." and "it showed all of it as a profit" [R. p. 613] "was net" [R. p. 664] "that there was no consideration paid" for the stock. [R. pp. 625, 630.]

Thereupon appellants sought to cross-examine the witness for the purpose of showing that the figures $578,-260.63 did not represent a net profit, that items of costs, expenses and valuations of services were properly charge-

able against the same, and that consideration was rendered therefor. [R. pp. 664-669.] An objection was interposed on the ground of improper cross-examination, followed by a colloquy between court and counsel whereupon the court ruled that appellants' counsel was not permitted "to question this witness with respect to any matters about any costs, expenses, valuation of services, or any other such thing which may go to constitute a proper charge or expense against this item of $578,-260.63." [R. p. 669.] This ruling of the court is assigned and specified as error. (A. E. No. 49.) [R. pp. 1462-1468.]

X.

The court erred in refusing to permit cross-examination of the witness Goshorn, called on rebuttal, with respect to his testimony that moneys received by Shingle, Brown & Co. was profit.

The witness Goshorn, called as a rebuttal witness, testified that the books and records in evidence showed that Shingle, Brown & Co. derived a profit of $84,128.21 from certain pool operations. [R. pp. 1250-1252.] And that the money received was taken into the profit and loss account as income together with many other items of income. [R. pp. 1252-1254.] When questioned concerning these matters on cross-examination the government objected that it was improper cross-examination, which objection was sustained and exception noted. [R. pp. 1354-6.] The ruling is assigned as error. (A. E. No. 68.) [R. pp. 1501-1503.]

XI.

The court erred in admitting in evidence over appellants' objections and in denying motions to strike testimony of the witness Fyfe to the effect that he told the defendant Perata that the defendant Wilkes had a reputation of being an "unscrupulous promoter"; "that Italo was getting in very bad shape"; "that it was generally rumored that the Italo was buying properties at prices very much more than their value" and "that men of very bad reputation were being brought into the company. The company was getting a very bad name." (Assignments of Error Nos. 25 and 26.) [R. pp. 1407-1410.]

Objections, motions and ruling. [R. pp. 214, 215, 216-217.]

XII.

The District Attorney was guilty of prejudicial misconduct and the court erred in permitting the District Attorney to comment on evidence that had been stricken from the record, said evidence being to the effect that the witness Fyfe told the defendant Perata that the defendant Wilkes' reputation was that of an "unscrupulous promoter." (Assignments of Error Nos. 63 and 64.) [R. pp. 1495-1499.] (Assignment of Misconduct and Ruling of the Court.) [R. pp. 1262-1265.]

XIII.

The court erred in proceeding with the trial after the presentation and filing of the affidavit of personal bias and prejudice directed against the trial judge, the Honorable George Cosgrave; and verified by the defendant Siens and joined in by the defendants Shingle and Brown and others. (Assignments of Error No. 4.) [R. p. 1392.]

XIV.

The court erred in failing and refusing to give instruction No. 42 requested by all defendants (A. E. No. 96) [R. p. 1527], and in giving the instruction which appears in the Record at page 1527. (A. E. No. 95.)

XV.

The court erred in failing and refusing to give Instruction No. 55 requested by all defendants (A. E. No. 93) [R. p. 1525] and in giving the instruction which appears on page 1292 of the Record and described in Assignment of Error No. 94. [R. p. 1526.]

XVI.

The court erred in refusing to instruct the jury as requested by appellants appearing in the Record page 1545. (A. E. Nos. 114 and 115.)

XVII.

The court erred in instructing the jury as appears in the Record pages 1536 and 1537 (A. E. No. 105) and in failing and refusing to give the instructions requested by the appellants and assigned as error Nos. 108, 109, 110, appearing in the Record pages 1538 to 1541.

XVIII.

The court erred in refusing to give to the jury the instructions requested by the defendants and the basis of Assignments of Error Nos. 114 and 115 appearing in the Record pages 1543 to 1545.

XIX.

The court erred in refusing to instruct the jury as requested in Instruction No. 41 (A. E. No. 88) [R. pp. 1519-1520] and in giving the instruction appearing in the Record, pages 1520-1521 (A. E. No. 89), with respect to the effect of evidence of good character and reputation.

XX.

The court erred in refusing to instruct the jury to return a verdict of not guilty as requested by these appellants at the conclusion of the evidence introduced by the plaintiff and renewed at the conclusion of all of the evidence. (Assignments of Error Nos. 17 and 18.) [R. p. 1403.]

XXI.

The court erred in overruling objections to the admission of any evidence heard upon the ground that the scheme and artifice to defraud alleged in the indictment had been fully consummated prior to the mailing of the letter pleaded in the twelfth count of the indictment. (A. E. No. 19.) [R. p. 1403.]

POINTS AND AUTHORITIES AND ARGUMENT UPON SPECIFICATIONS OF ERROR.

Various appellants have presented various specifications of error, some of which are applicable to all appellants, and some only to particular appellants. For the purposes of brevity and convenience we will not repeat the arguments presented by other appellants on specifications of error that are applicable equally to all appellants, but will adopt such arguments of the other appellants and, where necessary, supplement such arguments and authorities in so far as the position of these appellants is different from that of others. We shall also, for the purpose of brevity and convenience, argue several specifications of error together when the same proposition of law is involved.

It must now be apparent to the court that, since Shingle and Brown were not officers, directors or fiduciaries of any of the various oil companies involved in the evidence, their position is necessarily different from that of other appellants. It must be kept in mind that they were an independent financial institution dealing at all times at arm's length with all of the parties involved.

Argument on Specifications of Error Nos. I, II, III and IV.

As pointed out in appellants McKeons' brief, the rule is well settled that prejudicial error is presumed where appellants are deprived of substantial rights. (See authorities cited in McKeons' brief, pages 220-225.)

Specifications of error Nos. I, II, III and IV present substantially the same question, viz.: *Does the twelfth*

count of the indictment allege facts sufficient to constitute a public offense triable within the jurisdiction of the United States District Court for the Southern District of California?

As pointed out above the sufficiency of the twelfth count of the indictment was challenged by demurrer before trial by objections to the admissibility of evidence during the trial, by motion for an instructed verdict of not guilty, and by a motion in arrest of judgment *supra,* p. 73. It is our contention that the twelfth count of the indictment does not allege a public offense of which the trial court had jurisdiction, because it alleges an offense committed in San Francisco within the jurisdiction of the United States District Court for the Northern District of California.

Analysis of Mail Fraud Statute.

The mail fraud statute (*Federal Penal Code,* Sec. 215 [18 U. S. C. A., Sec. 338]) provides in part that

> "Whoever, having devised or intending to devise any scheme or artifice to defraud . . . shall, for the purpose of executing such scheme or artifice or attempting so to do, *place, or cause to be placed,* any letter . . . in any post office . . . *to be sent or delivered by the post office establishment of the United States, or shall take or receive* any such therefrom whether mailed within or without the United States, *or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter*" shall be guilty of an offense.

There are two elements to an offense under this statute: (1) the devising of a scheme or artifice to defraud and (2) the use of the United States mails in the manner provided by the statute for the purpose of executing said scheme or artifice.

U. S. v. Young, 232 U. S. 155 [58 L. Ed. 548];
Powers v. U. S., 244 F. 641 [C. C. A. 9].

The use of the United States mails is the gist of the offense and is the sole basis of federal jurisdiction.

Brady v. U. S., 24 F. (2) 405;
Havener v. U. S., 49 F. (2) 196.

A fraudulent scheme being assumed, it is a violation of the statute (1) **to place or cause to be placed** in the post office any mail matter to be sent or delivered by the post office; (2) **to take or receive** any such mail matter from a post office; or (3) to **"knowingly cause to be delivered** by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed" any such mail matter.

Under this statute jurisdiction is in one of three places. (1) Under the *mailing provisions* (Subd. 1, *supra*) at the place the mail matter is placed in the post office. (2) Under the second subdivision, at the place the mail matter *is taken or received* from the post office establishment. (3) Under the third subdivision, *at the place of delivery.*

Analyzed, the Twelfth Count Alleges the Mailing of a Letter in San Francisco.

The twelfth count of the indictment incorporates by reference the fraudulent scheme alleged in the first count and then alleges "that defendants did . . . knowingly, wilfully and unlawfully cause to be placed in the United States Post Office in San Francisco, California, and cause to be delivered by the post office establishment of the United States at Los Angeles, California . . . a certain letter in a postpaid envelope addressed to Mr. O. J. Rohde at 727 West Seventh Street, Los Angeles, California," [R. p. 56.] That *this count of the indictment clearly alleges an offense under the mailing provisions of the mail fraud statute* must be apparent from the allegations that the defendants did "knowingly, wilfully and unlawfully cause to be placed in the United States postoffice at San Francisco" a certain letter. The offense, therefore, is alleged to have been committed at San Francisco and not at Los Angeles.

The inclusion of the *explanatory words* "and cause to be delivered by the postoffice establishment of the United States at Los Angeles, California" does not affect the primary allegation of mailing at San Francisco. If we omit the last quoted words it is at once apparent that the count alleges an offense committed by the mailing of the letter at San Francisco. The statute does not make it an offense to "cause to be delivered" by mail a letter. It is made an offense to "*knowingly cause* to be delivered by mail" mail matter (1) according to the direction thereon, or (2) at the place at which it is directed to be delivered by the person to whom it is addressed. To sustain the indictment as alleging that defendants

"knowingly caused to be delivered by mail" the pleaded letter the court must disregard the primary allegation of mailing at San Francisco.

That the primary allegation is that of mailing and that the secondary allegation of delivery is merely explanatory thereof, is settled by decided cases.

In the case of *Salinger v. Loisel*, 265 U. S. 222 [68 L. Ed. 989] the defendant was indicted in the District of South Dakota and arrested upon the indictment in New York and New Orleans. In both latter places he was ordered removed to South Dakota for trial. He contended that the South Dakota court was without jurisdiction for the reason that the indictment charged an offense committed by the mailing of a letter in Iowa and not in South Dakota, and that to remove him to South Dakota for trial violated his constitutional rights under the 6th Amendment to the Constitution. The Supreme Court in holding that the accused must be tried in the district where the offense was committed said:

> "It must be conceded that, under the 6th Amendment to the Constitution, the accused cannot be tried in one district on an indictment showing that the offense was not committed in that district; we proceed, therefore, to inquire whether it appears, as claimed, that the offense was not committed in the district to which removal is sought."

Analyzing the indictment in the *Salinger* case to determine where the offense was alleged to have been committed, the Supreme Court said:

> "The indictment charges that the defendants, of whom Salinger is one, devised a scheme and artifice to defraud divers persons by means described, and

> thereafter, *for the purpose and with the intent of executing their scheme and artifice, did unlawfully and knowingly 'cause to be delivered by mail,' according to the direction thereon, at Viborg,* within the southern division of the district of South Dakota, *a certain letter* directed to a named person at that place, the letter and the direction being particularly described. *The indictment then adds, in an explanatory way* (see Horner v. United States, 143 U. S. 207, 213, 36 L. Ed. 126, 129, 12 Sup. Ct. Rep. 407), *that, on the day preceding the delivery, the defendants had caused the letter to be placed in the mail at Sioux City, Iowa, for delivery at Viborg according to the direction thereon."*

This language is peculiarly applicable to the present case. Here the indictment instead of alleging that the defendants "knowingly caused to be delivered by mail" matter alleges that the "defendants did knowingly, wilfully and unlawfully cause to be placed in the United States postoffice at San Francisco" the letter. And adds *"in an explanatory way"* that defendants "caused the mail matter to be delivered." *As the subsequent allegation of mailing in the Salinger case was held to be explanatory only, so here the subsequent allegation of delivery is merely explanatory of the allegations of mailing.*

That the indictment must be construed as alleging the mailing of a letter in San Francisco is sustained by the Supreme Court in analogous cases brought under the anti-lottery law (Federal Penal Code, Sec. 213), in the case of *Horner v. U. S.,* 143 U. S., 207 at 213 [36 L. Ed. 126 at 129] affirming 44 F. 677. In that case the

defendant was indicted in Illinois charged with six violations of the mail lottery statute. He was arrested in New York and resisted removal to Illinois on the ground that the indictment did not charge an offense committed in Illinois. *The first four counts* of the indictment in the *Horner* case substantially charged that the defendant *unlawfully and knowingly deposited or caused to be deposited in the postoffice at New York* a certain lottery circular "addressed to Mrs. M. Schuchman, 624 Illinois Street, Belleville, Illinois, in said district, and which was then and there carried by mail for delivery to said Mrs. M. Schuchman, 624 Illinois Street, Belleville, Illinois in said district according to the direction on said circular when it was so deposited in the postoffice at New York." *The fifth count* charged that defendant in Illinois *"unlawfully and knowingly" did "cause to be delivered by mail* to Mrs. M. Schuchman, 624 Illinois Street, Belleville, State of Illinois" a certain lottery circular "which said circular he, the said Edward H. Horner, *theretofore,* to-wit, on the 29th day of December, 1890, *did knowingly deposit and cause to be deposited in the postoffice at New York in the State of New York* . . .and was then and there carried by mail for delivery to said Mrs. M. Schuchman, 624 Illinois Street, Belleville, State of Illinois, according to the direction so upon said circular as aforesaid." It will thus be observed that the first four counts of the indictment in the *Horner* case are similar to the twelfth count in the present case, in that they charge *the mailing* of the letter in New York (San Francisco) and the delivery thereof in Illinois (Los Angeles) while the fifth count in the indictment in the *Horner* case is the converse, that is, it charges the delivery of the mail matter in Illi-

nois which had been mailed in New York. The trial court in construing the indictment and lottery law said:

> "Any person who shall *knowingly deposit or cause to be deposited,* or who shall knowingly send or cause to be sent, anything to be conveyed or delivered by mail in violation of this section, *or who shall knowingly cause to be delivered by mail* anything herein forbidden to be carried by mail, shall be deemed guilty of a misdemeanor, and may be proceeded against by information or indictment, and tried and punished, *either in the district at which the unlawful publication was mailed or to which it is carried by mail for delivery according to the direction thereon, or at which it is caused to be delivered by mail to the person to whom it is addressed.*
>
> *"This last provision is not enforceable any further than is compatible with the sixth amendment to the United States Constitution, which secures to the accused the right to trial in that district only wherein the offense was committed. Three somewhat different offenses are created by the section above quoted:* (1) *knowingly depositing,* or causing to be deposited, such forbidden matter in the mails; (2) *sending* such matter or causing it to be sent by mail; (3) *knowingly causing such matter to be delivered by mail.* All the counts, I think, describe the matter mailed sufficiently for the purposes of this application, as prohibited matter within the statute. *The first four counts are based entirely upon the first of the above three offenses, viz., knowingly 'depositing or causing to be deposited' such prohibited matter in the mails at New York. The fifth and last count charges the third offense, viz., that within the said southern district of Illinois, the defendant on the 31st of December, 1890, un-*

lawfully did, knowingly, 'cause to be delivered by mail' to the person therein named at Belleville, Ill., a prohibited circular, describing it, which it is alleged the defendant on December 29, 1890, did, knowingly, deposit and cause to be deposited in the New York postoffice, addressed to her as above stated, and which circular was then and there carried by mail for delivery to her.

"The first and second offenses do not require for their completion that the matter deposited in the mails for transmission should be, in fact, transmitted or delivered. All that is required to constitute those offenses is that the prohibited matter should be 'knowingly deposited,' or 'caused to be deposited' in the mails, or 'knowingly sent or caused to be sent' by the mails, for the purpose of transmission. *And if those offenses are completed at the place where the prohibited matter is deposited or sent for deposit, in the mails, whether the matter be transmitted or not, it may be that, under the constitutional provision invoked, no trial for those particular offenses could be had in any other district.* It is not necessary, however, to consider further those two clauses of the statute, or the first four counts of the indictment; for I have no doubt that the last count charges an offense which is not, and cannot be, completed without the delivery of the matter by mail to the person to whom it is addressed. This offense consists, under the third clause of the act, in 'knowingly causing such prohibited matter to be delivered by mail.' "

It is obvious from a reading of the decision in that case that the trial court held that the first four counts of the indictment pleaded an offense within the jurisdiction of

the New York court, and the fifth count an offense within the jurisdiction of the Illinois court.

On appeal the Supreme Court (143 U. S. 207 [36 L. Ed. 126]), after reviewing the indictment, and allegations at length, said:

> "The district judge of the United States for the Southern District of New York issued a warrant to the marshal for that district, to remove Horner to the Southern District of Illinois, 'to be tried in said district upon such counts in the indictment now pending in said district as the said Edward H. Horner can be legally tried upon.' In issuing that warrant, the district judge delivered an opinion (44 Fed. Rep. 677), *basing his decision upon the ground that the fifth count of the indictment charged an offense which was not, and could not be, completed without the delivery of the matter by mail to the person to whom it was addressed; that such offense consisted, under the third clause of the statute, in knowingly causing the prohibited matter to be delivered by mail;* that, under the fifth count, although the voluntary act began in New York, by deposit in the mail, the offense of causing the delivery by mail could not be consummated except by delivery to the person and at the place intended; that, in whatever way Horner might have caused such delivery to be made, either by deposit in the mail at New York or elsewhere, and wherever his voluntary act might have begun, the offense under the third clause of the statute, charged in the fifth count of the indictment, was not committed until the delivery by mail was made; *that, when such delivery was made, the offense was committed, and was committed at the place where the delivery was made.* . . .

"It is further urged, that Horner is held for trial in the Southern District of Illinois, for acts committed in the Southern District of New York. But we agree with the district judge in his opinion that, *whatever may be said of the first four counts of the indictment, the fifth count is good, for the reason stated by him.* . . .

"It is made a distinct offense in Sec. 3894, as amended, knowingly to cause to be delivered by mail anything forbidden by the statute to be carried by mail; . . . The distinct and separate crime charged in the fifth count of the indictment was committed in the Southern District of Illinois, and is triable there. . . .

"Objection is also made to the language of the warrant of removal, in that it directs the marshal to remove Horner to the Southern District of Illinois, 'to be tried in said district upon such counts in the indictment now pending in said district as the said Edward H. Horner can be legally tried upon.' It is urged that, notwithstanding this language, the warrant puts Horner upon trial in the Southern District of Illinois upon the whole indictment, and that it is void for indefiniteness, and does not inform Horner of the nature and cause of the accusation against him.

"We do not think there is any force in either of these objections. *If Horner should be put upon trial in Illinois upon all the counts of the indictment, he can demur to any of them, and thus have it determined which of the counts he shall meet.* The fifth

count is sufficiently specific, and the determination in the warrant of removal is only that there is at least one count of the indictment upon which Horner may be tried in Illinois. That is quite sufficient."

The present indictment is not sustainable under the delivery provisions of the mail fraud statute. The statute *does not require* that a person shall *"knowingly deposit* or cause to be deposited" but only that he shall "deposit or cause to be deposited." However, *the statute does require* that the person shall *"knowingly cause to be delivered by mail."* The indictment does not allege that the defendants "knowingly" caused the delivery of the twelfth count letter.

The law is well settled that an indictment upon a statute must allege distinctly with precision and certainty all of the elements of the offense created by the statute. An indictment omitting any of the essential elements of a statutory offense fails to state a public offense.

31 *C. J.* 703;

Evans v. U. S., 153 U. S. 583 [38 L. Ed. 830];

U. S. v. Carll, 105 U. S. 611 [26 L. Ed. 1153];

U. S. v. Cruikshank, 92 U. S. 542 at 558 [23 L. Ed. 588 at 593];

Pettibone v. U. S., 148 U. S. 197, 37 L. Ed. 419;

Keck v. U. S., 172 U. S. 437, 43 L. Ed. 505;

U. S. v. Cook, 84 U. S. 17, 21 L. Ed. 539;

Collins v. U. S., 253 Fed. 609, C. C. A. 9;

Moens v. U. S., 267 Fed. 317;

1 *Bish. New Crim. Proc.,* 2nd Ed., Sec. 98-a;

White v. U. S. (C. C. A. 10), 67 F. (2) 71.

In the *United States v. Carll, supra,* the Supreme Court stated the rule thus:

> "In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves *fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished;* and the fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the court to infer the intent of the Legislature does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent. U. S. v. Cruikshank, 92 U. S. 542 (XXIII, 588); U. S. v. Simmons, 96 U. S. 360 (XXIV, 819); Com. v. Clifford, 8 Cush. 215; Com. v. Bean, 11 Cush. 414; Com. v. Bean, 14 Gray 52; Co. v. Filburn, 119 Mass. 297."

When knowledge is an element of an offense such knowledge must be clearly and distinctly alleged in the indictment in the description of the offense.

2 *Bish. New Crim. Proc.,* 2d Ed., Sec. 532, Subdivision 3;

U. S. v. Carll, supra;

1 *Whart. Crim. Proc.,* Sec. 210, p. 258;
Joyce on Indictments, Secs. 410 and 412.

In 2 *Bish. New Crim. Proc.,* 2nd Ed., Sec. 522, it is said:

> "A statute sometimes makes it punishable to do a thing 'knowingly,' or 'knowing' a particular fact; so that the forbidden act, to be *prima facie* criminal, must be accompanied by the knowledge, and this must be alleged."

That the offense consists of the defendants "knowingly" causing the delivery of the prohibited mail matter is apparent from the language of the Supreme Court in the *Salinger* and *Horner* cases, *supra*. The use of the mails in a particular manner and with particular knowledge is the basis of the federal jurisdiction and must be alleged because it is the gist of the offense. Thus in the *Horner* case the Supreme Court said:

> "It is made a distinct offense . . . *knowingly* to cause to be delivered by mail anything forbidden by the statutes to be carried by mail."

Any argument of appellee that the words "knowingly, wilfully and unlawfully" caused to be placed mail matter in the postoffice at San Francisco applies to the words "caused to be delivered by mail at Los Angeles" is not supported by the cases.

> *Crank v. U. S.*, 61 F. (2d) 620 [C. C. A. 9];
>
> *Commonwealth v. Boynton*, 12 Cush. 499 [66 Mass. 499].

The courts have gone far to sustain an indictment where it was questioned for the first time on appeal or after verdict. In the present case, however, the defect in the indictment was called to the attention of the court at the very threshold of the case by demurrer and the point was never waived. We respectfully submit that the twelfth count of the indictment alleges an offense committed in San Francisco and the demurrer thereto should have been sustained and the motion in arrest of judgment granted.

The Trial Court Construed the Twelfth Count as Alleging an Offense Committed in San Francisco.

That *the trial court construed the twelfth count of the indictment as alleging the offense of mailing a letter in San Francisco* is clear from its instructions to the jury. The trial court instructed the jury that [R. p. 1278] "the twelfth count of the indictment charges that the defendants on or about the 23rd day of January, 1929, for the purpose of executing the scheme described, *placed in the United States post office in San Francisco* a postpaid envelope addressed to O. J. Rohde at Los Angeles containing a certain letter dated January 23, 1929, and which has been admitted in evidence as Exhibit No. 234."

And again the court instructed the jury that it was an offense to "place or cause to be placed any letter . . . in the post office establishment to be sent or delivered by the post office establishment." [R. p. 1280.]

The court having construed the indictment as charging the defendants with mailing a letter at San Francisco, should have granted the motion of appellants for an instructed verdict of not guilty and in arrest of judgment.

If the indictment here charged the defendants with "knowingly" causing the delivery of mail matter at Los Angeles, California, according to the direction thereon, then this element of the offense should have been stated to the jury by the court in its instructions.

It is the duty of the court to instruct the jury as to the elements of the offense, even in the absence of a requested instruction to that effect. The general rule is:

> "The instruction must contain a definition or explanation of the crime charged, in precise and accurate language, setting forth the essential elements thereof. An instruction is erroneous which assumes to state all the elements of the crime, but omits one or more of them, or which refers the jury to the indictment or information to ascertain any of the essential elements."
>
> 16 *C. J.* 968, citing numerous cases;
>
> *Kasle v. U. S.* (233 Fed. 878), C. C. A. 6;
>
> *Peterson v. U. S.* (213 Fed. 920), C. C. A. 9.

As a general rule it is the duty of the trial judge to instruct the jury fully, distinctly, and precisely, upon the law of the case (3 *Whart. Crim. Proc.,* Sec. 1644), although no request for instructions has been made. (16 *C. J.* p. 962, Sec. 2353; 15 *C. J.* pp. 1055-1056, citing numerous cases.) A neglect to give a full statement of the law requires reversal. (*Wharton, supra; Hersch v. U. S.,* 68 F. (2d) 799.)

Here the trial court *having construed the indictment as charging the mailing of a letter in San Francisco properly failed to instruct the jury that the defendants were charged with having knowingly caused the delivery by mail of a letter in Los Angeles but should have instructed a not guilty verdict. We are unable to understand the inconsistent positions adopted by the court in this case. Taking either horn of the dilemma the lower court committed reversible error and for these reasons the cause should be reversed.*

Argument on Specification of Error No. V.

This specification of error set forth *supra,* page 75, deals with the error of the trial court in unqualifiedly admitting evidence against these appellants with respect to transactions or "parts" of the alleged scheme to defraud when the bill of particulars and indictment specifically excluded them from participation in those transactions or "parts."

As pointed out, *supra,* pages 7 to 11, a bill of particulars was ordered requiring the government to specify those defendants who were alleged to have participated in the various "parts" of the alleged scheme. The government was given permission to amend the bill of particulars, which it did, and the court further ordered "that the government will be bound by the bill of particulars as filed, as against all defendants." As pointed out above in the analysis of the indictment and bill of particulars (*supra,* page 9), appellants Shingle and Brown were excluded from participation in certain transactions and by reason of such exclusion it must follow that, it is alleged that they (1) *did not* cause the execution of the Brownmoor-Italo contract at an excessive consideration, did not cause Italo to issue 600,000 units of its stock as a part of the purchase price therefor, (2) *did not* participate in the application for or receiving of permit from the Corporation Commissioner to issue the 600,000 units of Italo stock for the Brownmoor assets, and (3) *were not* officers or directors of Italo-American or Italo-Pete.

By reason of their exclusion from participation in the transaction whereby the Italo Company acquired the

McKeon assets, the indictment as restricted by the bill of particulars charges that appellants Shingle and Brown (1) *did not cause Italo to contract with the McKeon Company* to purchase the McKeon Company's assets at a consideration far in excess of the actual value of said assets (*supra,* pages 10-11); (2) they *did not cause Italo to issue and deliver to the McKeon Company* 4,500,000 shares of its stock as a part of the purchase price (it being alleged that this was done by the eight defendants who were officers and directors of the Italo Company); (3) that Shingle and Brown *did not have a secret arrangement and agreement* whereby any of the defendants should receive back from the McKeon Drilling Company, 2,500,000 or any other number of shares of the Italo stock issued for the McKeon assets without giving any consideration therefor [*supra,* p. 10; R. pp. 34 and 35]; (4) and Shingle and Brown *did not sell or cause to be sold* to some of the persons to be defrauded *"said stock so received by them* under said secret arrangement and agreement as. aforesaid and to convert the proceeds derived from the sale of the same to their own use and benefit"; (5) Shingle and Brown *did not apply to the Corporation Commissioner* for a permit to issue the Italo stock in acquiring the McKeon Company's assets and (6) *did not represent to the Corporation Commissioner* that Italo had agreed to deliver to the McKeon Company 4,500,000 shares of its stock as a part of the purchase price of said properties, then and there knowing and intending that the McKeon Company would only receive 2,000,000 shares of said

stock and that the defendants should receive 2,000,000 share thereof. [*Supra*, p. 10; R. pp. 35 and 36.]

At the outset of the trial these appellants objected to the introduction of evidence against them with respect to these transactions upon the grounds that they were not binding upon them [R. p. 222] and continuously reiterated these objections [R. pp. 225, 226, 228, 232-236, 261-264, 268, 269, 270], and when government counsel stated that he was offering evidence to show that appellants Shingle and Brown had "received some of the secret profits out of the Brownmoor-McKeon deals" these appellants objected, stating "that the bill of particulars furnished by the government in this case does not claim that Shingle, Brown or Jones were parties to any secret arrangement for the distribution of any of the McKeon Drilling Company stock and defendants were entitled to and did rely upon the allegation and that the government was not entitled to attempt to contradict it." [R. p. 298.] And this objection was continuously reiterated. [R. pp. 319-320, 344, 345, 346, 350, 353, 373, 374, 410, 448, 450, 454, 455, 460, 482 and particularly at 592 and 593, 607.]

The court nevertheless refused to sustain the objections and admitted the evidence unqualifiedly against these appellants as to those transactions that the indictment and bill of particulars excluded them from participation in. That these rulings of the court were prejudicial error must be apparent.

Granting of Bill of Particulars Discretionary.

The law is well settled that the court has discretionary power to grant a bill of particulars whenever it is satisfied there is danger that otherwise a party may be deprived of his rights or that justice cannot be done. A determination that the particulars are necessary is final and not subject to review.

Commonwealth v. Snelling, 15 Pick. (Mass.) 321;
Commonwealth v. Giles, 1 Gray (Mass.) 466;
State v. Wadford, 139 S. E. 608 (194 N. C. 336);
People v. Ervin, 174 N. E. 529 (342 Ill. 421).

Effect of Bill of Particulars Is to Restrict Proof.

The effect of a bill of particulars when granted is to restrict the proof to the matters set forth therein because to allow the party furnishing the particulars to go beyond it would be a surprise on the other party. It is reversible error to admit evidence in violation of the bill of particulars.

31 *C. J.,* p. 753, Sec. 310, Note 85;
U. S. v. Adams Express Co., 119 F. 240, 241;
U. S. v. Gouled, 253 F. 239;
State v. Wadford, 139 S. E. 608 [194 N. C. 336];
2 *Bish. Crim. Proc.,* 2nd Ed., Sec. 643;
Commonwealth v. Giles, supra;
Commonwealth v. Snelling, supra;
Rex v. Hodgson, 3 Car. & P. 422;
Rex. v. Bootyman, 5 Car. & P. 300;

Regina v. Esdaile, 1 Foster & F. 213;

Williams v. Commonwealth, 91 Penn. 493;

Thalmheim v. State, 38 Florida 169 [20 So. 938];

People v. Ervin, supra;

People v. McKinney, 10 Mich. 54;

Starkweath v. Kettle, 17 Wend. [N. Y.] 21;

McDonald v. People, 126 Ill. 150 [18 N. E. 817].

In the early case of *Regina v. Esdaile, supra,* a bill of particulars had been granted. Evidence was offered which was not within the transactions specified in the bill of particulars and Lord Campbell sustained the objection to the admission thereof.

In *Commonwealth v. Snelling, supra,* the defendant was indicted for criminal libel. Under the Massachusetts statutes, if the defendant expected to plead the truth of the statements as a defense, he was required to furnish a bill of particulars specifying the statement made and the times and places of the making thereof. The bill of particulars was ordered and furnished; during the trial evidence was offered of transactions not within the bill. The objection thereto having been sustained the defendant was convicted and appealed. The eminent Chief Justice Shaw, in reference to bills of particulars, said:

> "For this purpose, it may be proper to inquire somewhat extensively into the practice of courts of common law in requiring bills of particular, and the principle upon which it is founded."

The learned Chief Justice then reviewed numerous court decisions and said:

> *"The general rule* to be extracted from these analogous cases, *is, that where,* in the course of suit, *from any cause, a party is placed in such a situation, that justice cannot be done in the trial, without the aid of the information to be obtained by means of a specification or bill of particulars, the court in virtue of the general authority to regulate the conduct of trials, has power to direct such information to be seasonably furnished, and in authentic form; and that such an order may be effectual and accomplish the purpose intended by it, the party required to furnish a bill of particulars, must be confined to the particulars specified. . . .*
>
> *"The defendant having in his bill of particulars specified certain cases, and added the words 'and others' was prohibited from going into evidence of cases not otherwise specified. All the reasons which require a specification, require that the defendant should be confined to the cause specified, otherwise the purpose of the order would be wholly defeated."*

In *Commonwealth v. Giles, supra,* the defendant was indicted upon a charge of being a common seller of intoxicating liquor without a license. Defendant moved for and was granted a bill of particulars which specified the names of the persons to whom the sales of liquor were alleged to have been made. At the trial the District Attorney offered evidence *of other sales by defendant to persons not named* in the bill of particulars. The trial court admitted the evidence over objection to show the place of delivery and that the defendant was engaged in the business of being a common seller of liquor. For the

admission of this evidence the Supreme Court of Massachusetts reversed the case, saying:

> "Under an order of the court he (defendant) had been furnished before the trial, by counsel for the Government, with a list specifying the names of the persons to whom the sales which would be relied upon in support of the indictment, had been made. *Yet, upon the trial, the Government was permitted, against objection, to adduce proof of sales which were neither alleged in the indictment, nor indicated in the specifications.*
>
> "*It is now a general rule, perfectly well established,* that in all legal proceedings, civil and criminal, *bills of particulars or specifications of facts may be ordered by the court whenever it is satisfied that there is danger that otherwise a party may be deprived of his rights, or that justice cannot be done.* Whether such an order shall be made is a question within the discretion of the court where the cause in which it is asked for is pending, to be judged of and determined upon the peculiar facts and circumstances attending it. We are inclined to think that such a determination is final in the court where it is made and is not open to re-examination or revision. *But whether this be so or not, when it is once made, it concludes the rights of all parties who are affected by it; and he, who has furnished a bill of particulars under it, must be confined to the particulars he has specified, as closely and as effectually as if they constituted essential allegations in a special declaration.* (Commonwealth v. Snelling, 15 Pick. 321.)
>
> "*The evidence, therefore, of sales not mentioned in the list which was furnished to the defendant in the present case was inadmissible, and should have been rejected.* The particular purpose for which it was

allowed to be adduced, scarcely, if at all, limiting or diminishing its general force and effect, constituted no exception to the general rule, and afforded no sufficient or legal reason for disregarding it. *On the contrary, it seems to be particularly fit and necessary that the rule should have been supported and enforced, because this evidence of which the defendant was impliedly assured that nothing should be offered, tended directly and strongly to his conviction of the offense of which he was accused . . . as this evidence was material and defendant may have been injuriously affected by it a new trial must be granted."*

In the case of *State v. Wadford, supra,* defendant was indicted for embezzlement. The District Attorney furnished a bill of particulars specifying the six persons from whom he expected to prove the money was collected by the defendant and embezzled. On the trial, over objection, the state was permitted to offer evidence of two accounts of other customers not specified in the bill of particulars from whom the defendant was alleged to have collected money and embezzled the same. Defendant appealed from his conviction. The court in holding that the admission of this evidence was prejudicial and reversible error reversed the case, saying:

"Does the filing of a bill of particulars in a prosecution for embezzlement confine the state in its proof to the items set down or enumerated therein? . . .

"*The uniform current of authorities in other jurisdictions, where the question has been considered, is to the effect that* while the action of the trial court in ordering or refusing to order a bill of particulars is a matter of judicial discretion, nevertheless, *when once ordered and furnished, the bill of particulars*

becomes a part of the record and serves (1) to inform the defendant of the specific occurrences intended to be investigated on the trial, and (2) to regulate the course of the evidence by limiting it to the items and transactions stated in the particulars. (McDonald v. People, 126 Ill. 150, 18 N. E. 817; Commonwealth v. Giles, 1 Gray (Mass.) 466; People v. McKinney, 10 Mich. 554; Starkweather v. Kettle, 17 Wend. (N. Y.) 21; Bishops Crim. Proc., 2d Ed., Sec. 643; 14 R. C. L. 190; 31 C. J. 752."

The court, after quoting from the case of *United States v. Adams Express Co., supra,* said:

"The true office of a bill of particulars is two-fold. It is intended 'to inform the defendant of the nature of the evidence, and the particular transaction to be proved under the information and to limit the evidence to the items and transactions stated in the particulars.' (Citing People v. McKinney, *supra.*)

"Its purpose is to give him notice of the specific charge or charges against him and to apprise him of the particular transactions which are to be brought in question on the trial, so that he may the better or more intelligently prepare his defense and its effect, when furnished, is to limit the transactions set out therein. (People v. Depew, 237 Ill. 574, 86 N. E. 1090.) Unless this be its purpose instead of making for a fair trial it might tend to entrap the defendant and throw him off his guard or what is worse, prove to be a snare and a delusion.

"The competency of the evidence, herein questioned, to establish *scienter* or *quo animo* may not be resolved against the statutory effect to be given

to a bill of particulars which when ordered and furnished has as its purpose the limitation of the evidence to the particular scope of inquiry. Unless it has this effect the bill of particulars is of little value and certainly of doubtful benefit to the defendant. . . . For error in the reception of evidence over objection of transactions not specified in the bill of particulars there must be a new trial."

In the case of *People v. Ervin, supra,* the court said:

"The object of a bill of particulars is to give the defendant notice of the specific charges against him and to inform him of the particular transactions brought in question so that he may be prepared to make his defense. (Cooke v. People, 231 Illinois 9, 82 N. E. 863; McDonald v. People, 126 Illinois 150, 18 N. E. 817, 9 A. S. R. 547.) **Its effect, therefore, is treating the bill of particulars as a pleading, to limit the evidence to the transaction set out in the bill of particulars, otherwise the specifications of the bill of particulars would be a delusion or legal snare furnished for the purpose of deceiving the defendant.** (People v. Depew, 237 Ill. 547, 86 N. E. 1090.)"

In *United States v. Adams Express Co.,* 119 F. 240, the court said:

"Whether a bill of particulars is a matter of record of part of the indictment, and whether, with the indictment, it is subject to demurrer, are all probably to be answered in the negative. Whether such a bill shall be ordered seems to be discretionary with the court. It can be amended; while an indictment, of course, cannot be amended. An indictment often is in such general terms, and yet sufficient in law, as to

largely fail to apprise the defendant of what he must meet on the trial. *And the office of a bill of particulars is to advise the court, but more particularly the defendant, of what facts, more or less in detail, he will be required to meet. And the court will limit the government in its evidence to those facts set forth in the bill of particulars.*"

In the case of the *United States v. Gouled, et al., supra*, the court after citing the *Adams Express Company* case, *supra*, said:

"When a bill of particulars is once made and served, '*it concludes the rights of all parties to be affected by it, and he who has furnished the bill of particulars under it must be confined to the particulars he has specified as closely and as effectually as if they constituted essential allegations in a special declaration*' (Commonwealth v. Giles, 1 Gray (Mass.) 466, cited and approved in Dunlop v. United States, 165 U. S. 486, 41 L. Ed. 799."

The law is plain, therefore, that it is reversible error to admit evidence of matters contrary to the restrictions of the bill of particulars. The same reasoning applies to the admission of evidence for the purpose of showing that a defendant was a party to a transaction alleged in the indictment when the bill of particulars says that he was not. *The bill of particulars in such case merely serves to deceive the defendant affected if such evidence be admitted.*

What then was the evidence admitted in violation of the bill of particulars and its effect upon these two appellants Shingle and Brown? At the trial the Assistant Attorney General conceded in his closing argument that

the Italo American transaction, the $80,000 loan, the Brownmoor sale, and the Big Syndicate, were proper, not fraudulent, and that a conviction was not justified as to any defendant on the evidence admitted with respect to those matters. He based his plea for conviction solely on the McKeon transaction. This confession of the Assistant Attorney General was obviously in accord with the state of the evidence as will be hereafter seen.

As we have heretofore pointed out appellants Shingle and Brown were entirely excluded from participation in the Italo acquisition of the Brownmoor and McKeon assets. With respect to the McKeon deal they were *specifically excluded from being parties to a secret arrangement and agreement,* if any there was, *to receive any portion of the stock paid by Italo to McKeon for its assets,* or of receiving or selling any of said stock or deriving any benefit from the proceeds of said sale. Participation in the entire McKeon transaction was specifically restricted, in both the indictment and bill of particulars, to the eight defendants named as being officers and directors of the Italo Company. *The indictment and bill of particulars in effect said that "Shingle and Brown had no knowledge of or participation in these transactions."* Despite this, the court nevertheless, over the continuous objections of these appellants, permitted the introduction in evidence of numerous books of account and other documentary evidence which were used as a basis for the testimony of the government account Goshorn and for his summary Exhibit 297 and permitted him to testify that these appellants received a portion of the "bonus" stock issued by the Italo Company for the McKeon assets and "realized" large sums of money from the disposition thereof. These appellants were taken by surprise

by the admission of this evidence in plain violation of the bill of particulars, were deceived by the bill of particulars furnished by government counsel and were deprived, by the conduct of the District Attorney and the court, of that fair and impartial trial to which they were constitutionally entitled. In effect these appellants were tried upon matters not charged against them and which they were unprepared to meet. "No notice was given by the indictment of the purpose of the government to introduce proof of them." (*Boyd v. U. S.*, 142 U. S. 450 (35 L. Ed. 1077 at 1080).)

Argument on Specification of Error No. VI.

This specification of error (*supra*, p. 75) involves the refusal of the court to instruct the jury as to the effect of the bill of particulars on the allegations and proof.

The objections to the admission of evidence violating the solemn inhibitions of the bill of particulars and of the order of Judge McCormick that "the government will be bound by the bill of particulars as furnished, as to all defendants" having proved unavailing, these appellants nevertheless in a sincere and last desperate effort to have the court remedy the prejudice caused by its surprise rulings requested the court to instruct the jury as to the nature and effect of the bill of particulars.

These appellants requested the court to instruct the jury substantially as follows [*supra*, p. 77 *et seq.*]:

1. That the government was bound by, and restricted in its proof to proving the allegations of the indictment *as to the particular defendants named as having participated in the particular transactions*, but that the mere

fact that the bill of particulars specified that a particular defendant participated in a particular transaction was not evidence that he did. [A. E. 70; R. pp. 1404 and 1405.]

2. And that theretofore the jury *was not to consider any evidence as proving or tending to prove that appellants Shingle and Brown participated* in any of the following transactions not charged against them:

(a) In the organization of Italo-American or Italo-Pete [A. E. 71, 72, 73; R. pp. 1505-1507], or

(b) That they received a bonus from *Italo-Pete* for participating in the $80,000 loan [A. E. 74; R. p. 1507], or

(c) That they caused the execution of the Brownmoor-Italo contract or the issuance of stock by Italo for the Brownmoor assets [A. E. 75, 76, 77, 78; R. pp. 1507-1510], or

(d) Caused the execution of the Italo-McKeon contract [A. E. 79; R. p. 1511], or participated

(e) In the proceedings before the Corporation Commissioner for a permit for Italo to issue its stock in acquiring the McKeon assets [A. E. 80; R. pp. 1511 and 1512], or

(f) That they had knowledge of or were parties to a "secret arrangement and agreement" whereby the defendants were to receive 2,500,000 of the 4,500,000 shares of stock issued by Italo to the McKeon Company for its assets [A. E. 36, R. p. 1436; A. E. 81 and 82, R. pp. 1513 and 1514], or

(g) That they received, sold or profited from the sale of the "secret profit stock" "received under said secret arrangement and agreement" [A. E. 83; R. p. 1514].

These requested instructions are set forth in the record at the places above noted, are clearly in conformity to the allegations of the indictment and bill of particulars, are correct statements of the law, and were not covered by any instructions given by the court.

Under the decisions cited in support of the last argued specification of error it was prejudicial error for the court to admit evidence violating the bill of particulars and it was equally prejudicial to refuse to instruct the jury as to the effect of the bill of particulars furnished. In a trial with many defendants it must be obvious that the jury would be unable to sift the evidence as to each particular defendant and to know which acts were charged against some and not charged against others. In all fairness to defendants these instructions should have been given, and even had they been given it is doubtful whether the damaging effect of the admission of the evidence could have been remedied. The probabilities are that such damage could not be remedied, but in any event the refusal to give the requested instructions emphasized the error of the court. Exceptions were taken to the refusal of the court to give these requested instructions. [R. p. 1304.]

We feel that the error of the court with respect to (1) the admission in evidence against these defendants with respect to transactions not charged against them in the indictment and bill of particulars and (2) the refusal of the court to instruct the jury that they were not so charged is such patent error that the appellee herein should confess error. That the evidence was prejudicial cannot be denied. That appellants were taken by surprise cannot be denied because the record affirmatively

shows that with respect to all transactions in which they were advised by the bill of particulars that they were charged with participating they were prepared to and did meet and effectually refute all of said charges, and had they not been misled and deceived by the bill of particulars and indictment they would have been prepared to meet the charges and evidence with respect to these transactions. [R. 591-3.]

We respectfully call the court's attention to the authorities cited under the last specification of error as supporting specification of error No. VI, and also to the cases of *United States v. Pierce,* 245 F. 888 at 890, and the authorities cited in the McKeon brief, pages 352 to 364.

Argument on Specification of Error No. VII.

The court erred in admitting in evidence against these appellants the books of account and records of various corporations of which they were neither officers or directors, of whose contents they had no knowledge and in admitting the testimony and summaries of the government accountants based thereon, for the reason that no proper foundation had been laid for the admission of said records, and they were hearsay as to these appellants.

In McKeon brief, pages 252 to 267, and *supra,* pages 85-87, are listed the corporate books and records of corporations of which appellants Shingle and Brown were admittedly not officers or directors. The records in evidence were those of Italo-American, Italo-Petroleum, Brownmoor, McKeon Drilling Co., John

McKeon, Inc. and International Securities Company. The Wilkes-Cavanaugh records based on the Bacon & Brayton and Lieb Keystone records were not received in evidence although the government accountant's testimony was based in part thereon.

A lengthy standing objection specifying twenty-one separate grounds of objection to the admissibility of the books and records was interposed. [R. pp. 262-264.] A lengthy motion to strike the exhibits from evidence upon substantially the same grounds stated in the lengthy objection thereto was made during the trial [R. pp. 232-236] and a similar motion to strike and limit said testimony was made at the conclusion of the government's case in chief. [R. pp. 686-687.] Exceptions were taken to each adverse ruling of the court. Among the grounds of objection and motion were that the records were incompetent, irrelevant and immaterial; hearsay as to these appellants; there was no showing that the witnesses who identified the records had personal knowledge of the matters therein set forth; that the admission of said records violated the constitutional rights of appellants guaranteed to them under the Sixth Amendment to the Constitution of the United States which provides that each and every defendant has the right to be confronted with the witnesses who have personal knowledge of the matters in evidence; that said records were not the best evidence; that there was no proper foundation laid for their admission in evidence; that the records had not been shown to have been accurately kept; that they were not the books of any defendant on trial, but were the records of corporations, and were not competent or admissible as admissions against the interest of any

of these appellants on trial, and there was no showing that the contents of the books were properly authenticated. [R. pp. 232-236, 262-264.]

The McKeon brief, pages 252 to 330, adequately and clearly summarizes the testimony of the witnesses identifying these exhibits and points out the utter lack of foundation for their admission, and the lack of knowledge the identifying witnesses had as to the transactions recorded in said books or the accuracy thereof. We shall, therefore, adopt this analysis as part of this brief without further repetition.

The McKeon brief does not, however, summarize or discuss the lack of foundation evidence for the admission of the records of the McKeon Drilling Co., Inc.; of John McKeon, Inc., or of the International Securities Company.

As heretofore stated, it was stipulated by government counsel that neither Shingle nor Brown was an officer or director of any of the above-mentioned corporations Upon this subject the appellant Shingle testified:

> *"Neither Horace Brown,* Axton Jones, Rossiter Mikel *or myself* at any time during the period that I have related *was an officer or director or connected in any way in any official capacity or fiduciary relationship with the Italo Petroleum Corporation, or with any of the other companies that have been mentioned in evidence."* [R. pp. 930-931.]

With respect to the records of Shingle, Brown & Company, a corporation, the court made the following observation:

> "The Court: If you want any further information from Mr. Shingle, you can further cross-examine Mr. Shingle.

Mr. Redwine: *Well, I don't believe Mr. Shingle kept the records.*

The Court: *Well, Mr. Shingle can go and look at his records. They are his own records and he can understand them. Any witness from the witness-stand must be in a position to understand his own records. That would never be indulged for a moment. Go on."* [R. p. 961.]

Appellant Brown testified as follows:

"I was never at any time an officer or director of Italo-American Petroleum Corporation or of Italo Petroleum Corporation of America or of the Brownmoor Oil Company or of the McKeon Drilling Company or of the corporation known as John McKeon, Incorporated, and I never at any time had any access to or any knowledge of the entries contained in the books of account of the McKeon Drilling Company, the Italo Petroleum Corporation of America, the Italo-American Petroleum Corporation or the Brownmoor Oil Company, and I never directed or authorized anyone to make any entries in any of the books of account of these firms.

"With particular respect to the testimony that has been given here as to certain yellow sheets of paper in the handwriting of Mr. Edgar P. Lyons, a former defendant in this action, as to the set-up on the books of the McKeon Drilling Company of the receipt of 2,000,000 shares of the capital stock of the Italo Petroleum Corporation of America by the McKeon Drilling Company, I had no knowledge of and did not direct the entries of any of those matters in the McKeon Drilling Company books." [R. pp. 961-962.]

And that he was never an officer, director, employee or agent of any of these corporations he testified as follows:

> "During all of this period of time concerning which I have testified, I never acted as an agent, employee, director or officer of the McKeon Drilling Company or any of these other corporations that have been here referred to. I was an independent broker dealing for myself."

It must be obvious, therefore, that there can be no possible presumption or inference that appellants Shingle and Brown knew of the contents of the books and records of these corporations, and it was, therefore, incumbent upon the government to affirmatively prove such knowledge. No such proof was offered, but the contrary was clearly established by the testimony above referred to and that of the following witnesses:

The witness COURTNEY MOORE, a director of *Italo-American,* testified that Shingle and Brown had no connection with that company. [R. p. 197.]

The witness EMMA BALDOCCHI, bookkeeper, testified that Shingle and Brown never had access to and did not examine the *Italo-American* books of account. [R. p. 207.]

The testimony of the witness Ida M. Scettrini, a bookkeeper, is silent with reference to Shingle and Brown. [R. pp. 198-203.]

The witness MCLACHLEN who identified the minute books of Italo Petroleum testified that Shingle and

Brown never attended meetings of the Italo directors and were not directors or officers of that company. [R. p. 228.]

The witnesses Ida M. Scettrini, J. H. Jefferson [R. p. 254] and Guy B. Davis [R. p. 260], bookkeepers of Italo-Pete, made no mention of Shingle or Brown.

The witness J. S. Human, an Italo bookkeeper, testified that he never gave Shingle or Brown information from the Italo books. [R. p. 256.]

The witnesses Ralph Sunderhauf and Ada B. Lyle [R. pp. 283, 287, 301], stock transfer agents of Italo, testified that they never received any instructions, written or verbal, from Shingle or Brown.

The *McKeon Drilling Company* records were identified by the following witnesses:

D. C. TAYLOR, a McKeon bookkeeper, testified that Shingle and Brown never gave him any of the information set up in the McKeon books and never even saw the books as far as he knew. [R. p. 319.]

The witness E. A. THACKABERRY, secretary and treasurer of the McKeon Company, testified that the McKeon brothers were the company's officers and directors, *and that he never informed Shingle or Brown concerning the book entries* [R. p. 360] *and that he never saw them examine the books.*

The witness FRANCIS KING [R. pp. 467, 469], identified the books of the *Brownmoor Company* and made no mention of Shingle or Brown.

The books of the International Securities Company identified by the witness H. L. Bentley were received in evidence [R. p. 477], although the witness gave no testimony to the effect that either Shingle or Brown had knowledge of the contents of said books.

The books of John McKeon, Incorporated, a corporation, were received in evidence over objections upon the grounds of their incompetency and hearsay, although no mention was made of Shingle or Brown. [R. pp. 479 and 480.]

Photostatic copies of documents purporting to be records of Lieb, Keystone & Company to Wilkes-Cavanaugh partnership were received in evidence over objections, although the witness Lyle [R. p. 283] testified that Shingle and Brown knew nothing of the contents of said records. [R. p. 287.]

The records of Shingle, Brown & Company, a corporation, were identified by the witness Byers who gave no evidence concerning appellants' knowledge of or familiarity with such records, although appellants were officers of said company.

Exhibits 297, 298 and 299, and the testimony of the witness Goshorn were based on the above records, some of which were and some of which were not in evidence.

LAW AND ARGUMENT.

We have heretofore contended that this case must be reversed for the erroneous admission of the books of account, summaries and evidence in violation of the restrictions of the bill of particulars, and we now contend that the admission in evidence of these records was erroneous as to these appellants because no proper foundation was laid for their admission and they were hearsay.

Under the Sixth Amendment to the Constitution of the United States the appellants were entitled to be confronted by the witnesses against them. The Sixth Amendment provides in part that "in all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him."

Rule Stated as to Foundation Necessary for Admission in Evidence of Corporate Books and Records.

The rule is well settled that a book of account is not admissible in evidence where not shown to be a book of original entries, nor that the entries were made at the date of the transactions recorded, nor that they were known by the persons making them to be correct. (*Kerns v. McKean,* 76 Cal. 87; *Kerns v. Dean,* 77 Cal. 555.) It is necessary to show the correctness of the books and of the entries therein. (*Colburn v. Parrett,* 27 C. A. 541.)

Entries in books of account are admissible in evidence against the party responsible therefor as admissions against interest, and the general rule is that entries of a third person of transactions between such third person and others not parties to the litigation, or one of the

parties litigant, are not admissible because they are hearsay and res inter alios acta.

Sather v. Giaconi, 110 Ore. 433 [220 Pac. 740];

Radtke v. Taylor, 105 Ore. 559 [210 Pac. 863, 27 A. L. R. 1423].

The rules respecting the admission in evidence of corporate books of account, were well stated by this court in the case of *Osborne v. United States,* 17 F. (2d) 246 at 248, as follows:

> *"Ordinarily, before books of account can be received in evidence, a proper foundation must be laid.*
>
> "In order to lay the foundation for the admission of such evidence it must be shown that the books in question are books of account kept in regular course of the business, that the business is of a character in which it is proper or customary to keep such books, *that the entries were either original entries or the first permanent entries of the transactions, that they were made at the time, or within reasonable proximity to the time, of the respective transactions, and that the persons making them had personal knowledge of the transactions,* or obtained such knowledge from a report regularly made to him by some other person employed in the business whose duty it was to make the same in the regular course of the business. Chan Kiu Sing v. Gordon, 171 Cal. 28, 151 P. 657.
>
> "In discussing the same question in Chaffee & Co. v. United States, 18 Wall. 516, 21 L. Ed. 908, the court said:
>
> "'*And* that rule, with some exceptions not including the present case, *requires, for the admissibility of the entries, not merely that they shall be*

contemporaneous with the facts to which they relate, but shall be made by parties having personal knowledge of the facts, and be corroborated by their testimony, if living and accessible, or by proof of their handwriting, if dead or insane, or beyond the reach of the process or commission of the court. The testimony of living witnesses personally cognizant of the facts of which they speak, given under the sanction of an oath in open court, where they may be subjected to cross-examination, affords the greatest security for truth. Their declarations, verbal or written, must, however, sometimes be admitted when they themselves cannot be called, in order to prevent a failure of justice. The admissibility of the declarations is in such cases limited by the necessity upon which it is founded.'

"Measured by this rule it is quite apparent that a proper foundation was not laid for the admission of all the books and records received in evidence; *and, unless shown to have been accurately kept, the books of a corporation are not ordinarily admissible against its officers and stockholders in the absence of evidence tending to show that they had something to do with the keeping of the books, had knowledge of their contents, or such connection with the books as to justify an inference of actual acquaintance therewith.* Worden v. United States (C. C. A.), 204 F. 1; Cullen v. United States (C. C. A.), 2 F. (2d) 524."

In the case of *Worden v. United States,* 204 F. 1 [C. C. A. 6], cited with approval by this court in the *Osborne* case, *supra,* the defendant Worden and one Person were convicted of conspiracy to defraud the United States in the purchase of public land. The defendant

Worden was president of the Worden Lumber Company, defendant Person was superintendent, and one Duell looked after the office and kept the books. At the trial the books of the company were offered and received in evidence against the defendant Worden, and in holding such admission to be error the Circuit Court of Appeals said:

> "The books of account played an important part on the trial. Worden's books kept before the company was formed, were, as against him, competent evidence of the making of the alleged advances to entrymen. But the books were not, from the fact alone that they were Worden's, competent evidence against Person. The question of the competency of the company's books affects both plaintiffs in error. The importance of the books, both of Worden and of the company, appears . . . *and if the evidence offered by the books were eliminated, the proof, in our opinion, would have been insufficient to support a conviction of plaintiffs in error, having in mind the necessity of unlawful agreement, prior to application for purchase.* The books of the company (as distinguished from Worden's) are important. . . .
>
> *"Were the corporation the opposite party here, entries on its books would be competent evidence when in the nature of admissions,* and without the necessity of strict authentication beyond establishing the identity of books. Foster v. United States (C. C. A. 6), 178 Fed. 165, 175, 101 C. C. A. 485, 495, and authorities cited. *The corporation, however, is not here the opposite party;* there was no affirmative proof that the books were correctly kept; *and while*

the rule is well settled that entries in the books of a corporation showing dealings between it and its managers are competent evidence against the latter, even in a criminal prosecution, on proof of such connection and familiarity with the books as to justify an inference of actual acquaintance with their contents, as being admissions or assertions of the facts stated therein (Foster v. United States, *supra;* People v. Leonard, 106 Cal. 302, 39 Pac. 617; Olney v. Chadsey, 7 R. I. 224; Bacon v. United States, 97 F. 35, 40, 38 C. C. A. 37), *yet such is, we think, the only theory on which the entries in question can be held competent evidence against the defendants.* State v. Ames, 119 Iowa 680, 684, 94 N. W. 231; Lang v. State, 97 Ala. 41, 46, 12 South. 183; Bartholomew v. Farwell, 41 Conn. 107, 111.

"While (unless by the above paragraph which we have italicized in full) the court made no express ruling that the proofs were such as to make the book entries competent evidence against the defendants, we are constrained to think that the language referred to (and in view of the fact that defendants were shown to have participated in the management of the company, and that one of them, although not one of the plaintiffs in error, took part in the bookkeeping) may well have been understood by the jury (although perhaps not so intended) as a ruling that the bookkeeping entries would be, in the contingency stated, competent evidence against plaintiffs in error. See F. C. Austin Mfg. Co. v. Johnson (C. C. A. 8th Cir.), 89 Fed. 677, 683, 32 C. C. A. 309.

"The facts referred to did make the bookkeeping entries competent as against Duell; they were not alone sufficient to make them competent as against

plaintiffs in error. The ruling, we think, constituted prejudicial error unless the evidence, taken together, justified a ruling that the bookkeeping entries were competent evidence against plaintiffs in error. This brings us to the question whether the proofs were such as to justify treating the book entries, including not only the original but transfer entries, competent evidence as against defendants here complaining on the basis of admissions or assertions by them.

"It clearly appears that Person had nothing to do with keeping the books. He was simply superintendent, and there is nothing to indicate that he knew anything about bookkeeping or that he paid any attention to it, or that he directed any of the entries in question. . . . The showing was not such as, in our opinion, to justify a ruling that the bookkeeping entries were competent evidence against him.

. . .

"Unless the mere fact of Worden's presidency and management of the company raised a legal presumption of his acquaintance with the book entries, thus putting upon him, in defense of a charge of crime, the burden of rebutting such legal presumption, we think the books cannot, in the peculiar state of this record, be held as a matter of law competent evidence against him. *We have found no persuasive decision sustaining such legal presumption* (in the absence of statutory requirement of correct bookkeeping) *except on proof that the books were kept under the instruction, direction, or supervision of the person against whom the entries are offered, or that such person presumably had examined the books or in some way obtained actual knowledge of the entries.*"

As the court said in the *Worden* case, "the corporation is not here the opposite party." Here the above mentioned corporations were not the opposite party. Neither were the defendants Shingle or Brown officers or directors of said companies and had nothing whatsoever to do with the entries contained in the books of account and never directed the making thereof. We have in this case then, a situation where entries were made in books of account by bookkeepers employed by corporations entirely without the knowledge of appellants, which entries, although not proven to be correct and concerning which the parties making the entries had no personal knowledge of the transactions recorded, are admitted in evidence against these appellants in a criminal prosecution. *The books and entries therein might be considered as admissions against the corporations involved if they were parties to the action, but we cannot see how they can be considered against these appellants personally, especially when they are shown to have had nothing to do with their keeping and no knowledge of their contents. If they are to be considered as admissions against these appellants should not there be some proof that these appellants knew what the books contained?* There was not only no affirmative proof of this fact introduced but it was affirmatively established in all instances that these appellants knew nothing whatsoever of the contents of the above mentioned books. Manifestly these entries could not be admissions of these appellants unless they had something to do with them or knew what they were. If they are to be considered as contradictory of statements which the appellants might have made regarding the conditions of these corporations (which we submit is not the case here), then it is obvious that the proper

foundation must be laid for their introduction. But such is not the case for these were introduced as part of the government's case in chief. Surely under these circumstances entries in books not shown to be accurate, not shown to have been made with the knowledge of these appellants and shown to be the books of third party corporations with which these appellants were not connected, could not be received in evidence as against them. There can here exist no presumption of familiarity with the books by reason of the fact that appellants were officers of the corporation, for here they were not officers of the corporation and the affirmative evidence shows that they had nothing whatsoever to do with the books. As said by the Supreme Court of the United States in the case of *Chaffee & Company v. United States,* 18 Wall. 516 (21 L. Ed. 908):

> *"The books of a corporation are not ordinarily admissible against its officers and stockholders, in the absence of evidence tending to show that they had something to do with the keeping of the books, had knowledge of their contents, or such connection with the books as to justify an inference of actual acquaintance therewith."*

In the case of *People v. Burnham,* 104 N. Y. Sup. 725, defendant was tried for the larceny of funds of a company of which he was an officer, said larceny being the use of the company funds in paying the claim of a third person made against another officer of the company individually. The books of the corporation were introduced in evidence against the defendant to show an entry

respecting the payment of the claim of the third person. With reference to this testimony the court said:

> "There was also evidence admitted, against the objection and exception of the defendant, in relation to the entry in the books of the corporation respecting this payment, *which was incompetent as against this defendant. He was not shown to have had anything to do with these books, or any knowledge of their contents, or any connection with the entries. The books of a corporation are not evidence as against an officer of the corporation in a criminal prosecution against him.* Rudd v. Robinson, 126 N. Y. 113, 26 N. E. 1046, 12 L. R. A. 473, 22 Am. St. Rep. 816 (P. 734)."

The leading case in California upon this point is the case of *People v. Doble,* 203 Cal. 510. In that case defendants were charged with a conspiracy to violate the Corporate Securities Act. One of the defendants, Cox, kept a combined set of books, some in Los Angeles and others in San Francisco. An accountant on behalf of the prosecution was allowed access to certain books supposed to be Cox's books and from them a summary was compiled and introduced in evidence over the objection of appellants. In this connection the Supreme Court said:

> "It is contended, however, that said books and the summary thereof were admissible as the acts of an agent as to the substantive offenses charged and as the acts of a co-conspirator as to the offense of conspiracy. If we admit that Cox was the agent of appellant, this might allow *his declarations, made within the scope of his agency, to be admitted in a civil cause, but human liberty does not rest upon so weak a foundation. A principal, in order to be held criminally liable, must be shown to have knowingly*

and intentionally aided, advised, or encouraged the criminal act committed by the agent. In the absence of proof to this extent, the summary of the books should not have been received as a declaration binding upon appellant. . . .

* * * * * * * *

"It should also be observed that said summary received in evidence was compiled not only from the Cox books, but also from the books of the Doble corporation and from a comparison of the two sets of books. But again appellant denied all knowledge of the entries in the books of said corporation, in so far as the same were summarized and received in evidence. The summary of the Doble corporation books was apparently admitted upon the theory that the set of books from which the entries were taken consisted of books required by law to be kept and hence admissible for that reason."

The court, after quoting with approval from the *Worden* case, *supra,* said:

"In the case of McDonald v. United States, 241 Fed. 793, 800 [154 C. C. A. 495], one Hendrey, the president of a Memphis bank, with plaintiffs in error and six others, was indicted for using the mails in furtherance of a scheme to defraud by organizing a company, called a bank, but in substance a holding company or chain of banks, and selling stock in and getting deposits therefor by false representations. Upon various errors alleged the verdict and sentence against Hendrey were reversed, the court, among other things, holding as follows: 'Evidence was received as to the contents of the books, of the Memphis bank, of which Hendrey was president. This bank was a corporation, and the

> contents of the books of the corporation could not be put in evidence in a criminal prosecution against the president without a more direct showing of his personal responsibility for the bookkeeping than we observe here. (Worden v. United States, 204 Fed. 1, 9 [122 C. C. A. 315].)"

Further citation of authority is unnecessary for the reason that it is apparent that these books and records were not admissible in evidence against these appellants for any purpose whatsoever. From the foregoing cases it is clear that, assuming a proper foundation had been laid as to the accuracy and contemporaneous making of the entries, the books of a corporation are admissible against its officers and directors as admissions against their interests only upon a showing of knowledge of and familiarity with the entries therein. Such knowledge and familiarity must affirmatively appear from the evidence and is never presumed. The converse of this rule is also true and that is that corporate records are not admissible or competent against persons who, the evidence affirmatively shows, were not officers or directors of the corporations involved and did not have access to or knowledge of the entries in the said books of account. The basic reason for the rule is that such entries are hearsay.

Under the rules above quoted it was necessary before such records were admissible against any defendant to show that such defendant had knowledge of the entries contained in said books and here such evidence is lacking. As stated in the *Worden* case, *supra,* "the books were not from the fact alone that they were Worden's competent evidence against Person." It is clear that these appellants had no knowledge of any of the entries contained in

the books of the McKeon Drilling Co. and the other corporations.

The obvious purpose and effect of the admission in evidence of the above mentioned records was so that they might be used as the basis of the summaries of the government accountants to show the following matters:

1. The Italo American books to show the payment of dividends from capital and not from net earnings or surplus, and that the book value of the Italo American assets had been appreciated on the books.

2. The Brownmoor books to show who the stockholders of record of that company were and that the 600,000 units of Italo Petroleum Corporation stock issued for the Brownmoor assets were not distributed to such stockholders of record and the elimination of the Baldwin Hills-Inglewood lease from the assets transferred to the Italo Petroleum Company.

3. The Italo Pete books were admitted to show the nature and book value of the assets acquired from the Italo American and Brownmoor and other companies, the issue and transfer of shares of stock and the financial condition of the company.

4. The McKeon books were admitted to show the cost and book value of the assets transferred to Italo, the consideration contracted for and received by McKeon; that a number of shares of the stock were paid "as commissions," "bonus" or "secret profits," and the explanation of the profit on the McKeon-Italo transaction.

Without this evidence, that remaining in the record merely disclosed the following facts:

1. That Italo Pete borrowed $80,000 from a syndicate which it repaid.

2. That Italo Pete bought certain assets of Brownmoor Oil Company for 600,000 units of Italo Pete stock which were issued to the parties thereto entitled, to-wit: Frederic Vincent & Company.

3. That Italo acquired the assets or stock of many oil companies at a fair valuation and that the sellers of said assets received the agreed fair consideration.

4. That a syndicate was formed to finance the acquisition of these assets and the syndicate members received what they were entitled to receive for the moneys subscribed by them.

5. That the stock delivered to McKeon Drilling Co. for the Italo assets was paid to the persons to whom the owners thereof directed it should be paid for valuable consideration; that all persons receiving any of such stock received it for value.

We contend therefore as stated in the *Worden* case, *supra,* that "if the evidence offered by the books were eliminated, the proof, in our opinion, would have been insufficient to support a conviction of plaintiffs in error, having in mind the necessity of unlawful agreement, prior" thereto.

Since the books of account and records were inadmissible the testimony of the witness Goshorn and the summaries prepared by him, Exhibits 297, 298 and 299, were inadmissible (*People v. Doble, supra*), and the evidence of the witness Hynes relative to the Italo-American books was likewise inadmissible.

We adopt the argument in McKeon brief pages 267-285 and the argument respecting the unwarranted conclusions of witness Goshorn therein referred to pages 286-331 with respect to Exhibits 297 and 299.

Argument on Specification of Error No. XV.

The court erred in refusing to give Instruction No. 55 requested by all defendants [A. E. No. 93, R. 1525] and in giving the instruction which appears on page 1292 of the Record and is described in Assignment of Error No. 94. [R. 1526.]

The futile efforts of appellants to protect themselves against the error arising from the admission in evidence of these books and records is fully discussed in the McKeon brief, pages 283 to 285, which argument we adopt without reiteration.

Argument on Specification of Error No. VIII.

The court erred in permitting the jury to receive evidence out of court by sending to the jury room during the deliberations of the jury certain exhibits containing matter that had been stricken from evidence.

This specification of error (*supra,* pp. 89-90) involves the conduct of the trial judge in sending Exhibits 155, 297 and 299 to the jury room, which exhibits contained prejudicial matter that had been ordered stricken from evidence but had not been deleted from said exhibits at the time they were sent to the jury room. Although appellants objected to the said exhibits being sent to the jury room upon the ground that they contained matter that had been stricken from evidence the court overruled the objections and ordered said exhibits sent to the jury for its consideration during its deliberations. [R. 1335 to 1340.]

In the McKeon brief, pages 331 to 352 and *supra,* pages 89-90, are summarized the proceedings resulting in the court sending the objectionable exhibits to the jury room. The prejudicial character of the Westbrook affidavit (Exhibit 155) and the highly prejudicial description of the stock as "bonus" stock on Exhibits 297 and 299 is clearly pointed out.

It Is Reversible Error for the Jury to Receive Evidence Out of Court.

As a general rule it is reversible error to permit the jury even by mistake to take with them to the jury room papers or articles not properly in evidence and which would tend to influence their verdict. (64 *C. J.* 1029, Sec. 820.)

Where a portion of a book, paper or document is excluded from evidence the jury should not be permitted to take the paper on retirement to the jury room unless something is pasted over the excluded portion or it is withheld from the jury in some other effectual mode, and it is error to send the entire paper to the jury room with no safeguard against their examining the parts of the paper which have not been admitted in evidence except a direction to examine only that part which has been admitted. (64 *C. J.* 1029.)

In the case of *Bates v. Prebel,* 151 U. S. 149 (38 L. Ed. 106) an action was brought to recover of the defendant *stockbrokers* the value of certain securities alleged to have been converted. From a judgment for

plaintiff and order denying a new trial defendants appealed. During the trial certain pages of a memorandum book in plaintiff's handwriting purporting to show the date of delivery and the nature of the securities delivered to the defendants was admitted in evidence. After holding that the memorandum was inadmissible in evidence and referring to the fact that nevertheless the entire book was permitted to be taken to the jury room the Supreme Court said:

> "By the ninth assignment of error it appears that after the close of the case, and when the jury were about to retire to consider their verdict, the court allowed the whole of the memorandum book to go to the jury without any sealing or other protection of the leaves and pages not put in evidence. It appears that when the court admitted the leaves and pages containing the memoranda above alluded to, it directed the rest of the book to be sealed up or otherwise protected from the inspection of the jury; but that when the jury were about to retire, the plaintiff offered to send the whole book, without such protection, and the court directed the jury not to examine any part of the book except what was put in evidence, and permitted the whole book with that instruction to go to the jury. To this the defendants excepted. *We think the court should have adhered to the directions to take such measures as were necessary to prevent the jury from seeing other portions of the book, as they contained matter, which though bearing upon the issue, was wholly inadmissible as testimony, and was calculated to create in the minds of the jury a strong prejudice against the defendants. This error was not cured by the instructions to the jury not to examine any part of the book ex-*

cept what was put in evidence. Such instructions might have healed the error, if the contents of the book had been unimportant. But the objectionable portions in this case were such as were likely to attract the eye of the jury, and accident or curiosity would be likely to lead them, despite the admonition of the court, to read the plaintiff's comments upon the defendants and her private meditations, which had no proper place in their deliberations. The precise question involved here arose in Kalamazoo Novelty Mfg. Co. v. McAlister, 36 Mich. 327, where an entire book was suffered to be taken to the jury room when but three pages were in evidence, and it was held that the instruction not to look at the unproved part should not be taken as relieving its admission to the jury room from error. See Com. v. Edgerly, 10 Allen, 184; Stoudenmire v. Harper, 81 Ala. 242."

In the case of *Alaska Commercial Company v. Dinkelspiel,* 121 F. 318 (C. C. A. 9) the court permitted an exhibit for identification to go to the jury room and considered as part of the evidence in the case. At the time the jury requested the exhibit be sent to the jury room the court stated that its recollection was that the paper was marked for identification and then received in evidence while counsel for appellant stated that it was identified and was never offered in evidence and counsel for the appellee stated that it was an oversight if it was not offered in evidence. In holding that the action of the court in permitting this exhibit to be taken to the jury room was reversible error this court said:

"The paper never having been offered in evidence, nor submitted to opposing counsel for their exami-

nation, the latter had no opportunity to cross-examine the witness who made it concerning the data from which it was prepared, or other circumstances connected therewith. *In view of all these considerations, it is impossible to escape the conclusion that to permit the exhibit to go to the jury as evidence was error for which the judgment must be reversed. We are unable to say how much the jury may have been influenced by such evidence in finding their verdict. It is enough to say they may have been influenced by it.* Bates v. Preble, 151 U. S. 149, 14 Sup. Ct. 277, 38 L. ed. 106; Vicksburg & M. R. Co. v. O'Brien, 119 U. S. 99, 7 Sup. Ct. 118, 30 L. ed. 299." In the case last cited, Mr. Justice Harlan, speaking for the court, said:

"While this court will not disturb a judgment for an error that did not operate to the substantial injury of the party against whom it was committed, it is well settled that a reversal will be directed unless it appears, beyond doubt, that the error complained of did not and could not have prejudiced the rights of the party;" citing Smiths v. Shoemaker, 17 Wall. 630, 639, 21 L. ed. 717; Deery v. Cray, 5 Wall. 795; Moores v. Nat. Bank, 104 U. S. 625, 630, 26 L. ed. 870; Gilmer v. Higley, 110 U. S. 47, 50, 3 Sup. Ct. 471, 28 L. ed. 62."

A new trial should have been granted for this consideration by the jury of evidence not admitted. New trials are freely granted where the jury are allowed to consider papers and documents not in evidence. (16 *C. J.* p. 1171, Sec. 2679.)

Prejudice Is Presumed and Burden Is on Appellee to Show Lack of Prejudice.

In *Ogden v. U. S.,* 122 F. 523 (C. C. A. 3) defendant was prosecuted for violation of the Food and Drug Act in selling insufficiently stamped oleomargarine. After conviction a new trial was granted and on the retrial he was again convicted. The court refused to allow the defendant to file, and refused to consider, a motion for a new trial. This was held error. In retiring to consider its verdict the jury was handed the indictment with the endorsement thereon of the guilty verdict of the first trial. In this connection the court said:

> "It is, however, contended by the counsel for the defendant in error that it is not shown by the depositions taken that the indorsements on the indictments were read by any of the jurors. *The fact that papers with such indorsements upon them were handed to the foreman of the jury, presumably by authority, along with other papers, by an officer of the court, could hardly fail to give to the jury the impression that they were intended for their consideration, and that they were expected to have some weight in forming their verdict. We do not think it was necessary on the part of the defendant below to show that such indorsements had been read by the jurors or any of them. It was a gross violation of the rights of the defendant below that they should have been handed to them at all in the manner in which they were. Trial by jury is properly surrounded by every reasonable safeguard, to insure the absence of any improper influence that might operate upon the minds of the jurors, and give to their verdict the dignity and respect so important to be maintained in the interests of an impartial ad-*

ministration of justice. It was not necessary, therefore, in our opinion, that the defendant below should have gone further than he did, when he showed the presence in the jury room of the indictments with the obnoxious indorsements, and the circumstances under which they came into the possession of the jury. Whether proof that these indorsements were not read by any of the jury would have brought us to a different conclusion need not now be considered. *If it would have had such an effect, the burden was upon the defendant in error to produce the proof. The presumption that their presence in the jury room, under the circumstances, was injurious to the defendant below, remains until rebutted by evidence on the part of the plaintiff below.*

We could rest this view of the matter upon the exceeding importance of guarding every approach by which improper influence may reach the jury room, and it would much diminish the efficiency of these safeguards if we were to require the aggrieved party to a suit, to not only show that obnoxious and prohibited documents or other evidence were in the possession of the jury, but that the jurors had actually availed themselves of the opportunity thus presented to them by reading or discussing the same. An auxiliary reason for the view we have thus stated is that it is not open, to one seeking to set aside the verdict of a jury, to use jurors themselves as witnesses to disparage their own verdict."

Where such evidence is sent to the jury room there must be a clear showing that the evidence sent was not prejudicial. (*People v. Thornton,* 74 Cal. 482.)

As pointed out in the above cases the burden is not upon the appellants but is upon the appellee to show that

the evidence sent to the jury room was not prejudicial. It is clear that Exhibit 155 was prejudicial to the defendant Siens. It was likewise prejudicial to the appellants Shingle and Brown and others in view of the statement to the effect that the "Shingle Syndicate" made large profits "of from five or ten to one." Considering the fact that the only count upon which the defendants Shingle and Brown were convicted referred to a letter sent to a syndicate member and were acquitted on all other charges, this statement in the statement must have been prejudicial to their interests.

With respect to Exhibit 297 the gist of the charge of the government with respect to the McKeon Drilling Co. Inc. transaction was that this stock was a "secret profit" and that the defendants (at least some of them) had a "secret arrangement and agreement" whereby they were to obtain this stock as a "secret profit" or "bonus" without giving any consideration and to divide the same among themselves. This being the focal point of the government's case it was highly prejudicial and erroneous for the government accountant to designate this stock as "bonus stock" when there was no such designation of the same in any of the records in evidence. It is the duty of an accountant to examine the books and records in evidence and to give a summary of the contents thereof, but it is not the duty of an accountant to usurp the functions of the jury and designate that stock as "bonus" stock, or declare that said stock was delivered without consideration. It is not the duty of an accountant to go outside of the records in evidence and coin a prejudicial, damaging label for the transactions shown by the books and records.

In the case of *Lewis v. United States,* C. C. A. 9, (38 F. (2) 406 at 411) this court described the duties of an expert accountant as follows:

> "The reason for utilizing an expert accountant is that he may *explain the technical significance of the account books,* that is, of the nature and character of the entries, whether debit and credit, etc. and to deduce therefrom whether the books do or do not show certain facts in issue. In the strict sense of the term he does not testify at all, except as to the accuracy and good faith of his deductions. *He fills the same function as an adding machine, or a mechanical computer.*"

To allow the above mentioned evidence to go to the jury room must have left an indelible impression on the jury that the stock was "bonus stock" and was labeled such in the books and records examined by the government accountant and upon which he based his testimony.

As was said in the *Ogden* case, *supra:*

> "The fact that papers . . . were handed to the foreman of the jury, presumably by authority, along with other papers, by an officer of the court, could hardly fail to give to the jury the impression that they were expected to have some weight in forming their verdict . . . It was a gross violation of the rights of the defendant below that they should have been handed to them at all in the manner in which they were."

After a jury has retired to deliberate on its verdict unusual care should be and always is exercised to see that the jury does not communicate with persons outside the

jury room and does not receive evidence out of court. In the present case the court did not only not endeavor to keep the rejected evidence from the jury, but *expressly ordered that it be delivered to them* even though counsel expressly called the court's attention to the fact that such exhibits were not in evidence. For the court to sanction the sending of evidence to the jury room which has not been received in evidence but has been expressly excluded therefrom would be to place judicial sanction upon the deprivation of a defendant of his constitutional rights to a fair trial by jury For these reasons we respectfully contend that reversible error was committed and the cause should be reversed.

Argument on Specification of Error No. XI.

It was prejudicial error for the court to admit evidence as part of the government's case in chief to the effect that the appellant Wilkes and his associates were men of "very bad reputation" and that Wilkes was an "unscrupulous promoter."

In this specification of error, *supra*, page 93, we have summarized the evidence, objections, rulings and exceptions with respect to the testimony of the witness Douglas Fyfe called as a witness in the government's case in chief to the effect that he told the defendant Perata "that men of very bad reputation were being brought into the (Italo) company" and that Wilkes was an "unscrupulous promoter". That such evidence was prejudicial and improperly admitted must be apparent.

Evidence of Bad Character Inadmissible Unless Good Character First Put in Issue by Defendant.

It is a fundamental rule of criminal law that the state is not entitled to introduce evidence of the bad character or reputation of an accused unless he has already clearly and expressly put his character in issue by introducing evidence of good character.

16 *C. J.* 581, Sec. 1122;

U. S. v. Jourdine, 26 Fed. Case No. 15,499;

U. S. v. Kennedy, 26 Fed. Case No. 15,522;

U. S. v. Warner, 28 Fed. Case No. 16,642;

State v. Shaw, 75 Wash. 326 (135 Pac. 20);

State v. Craddick, 61 Wash. 425;

Mercer v. U. S., 14 F. (2) 281 at 283;

Thompson v. U. S., 283 Fed. 895;

Jianole v. U. S., 299 Fed. 496.

To permit evidence of bad character or reputation of an accused to go before the jury when a defendant has not put his character in issue is reversible error.

See cases cited, *supra,* and

Pound v. State, 43 Ga. 88.

In the case of *Greer v. U. S.,* 245 U. S. 559 (62 L. Ed. 469) the Supreme Court established the rule in the federal courts that there is no presumption of good character; and in so doing the court reaffirmed the rule that the government can only put in evidence of bad character

to refute evidence of good character produced by a defendant, and in this respect said:

> *"As the government cannot put in evidence except to answer evidence introduced by the defense, the natural inference is that the prisoner is allowed to try to prove a good character for what it may be worth, but that the choice whether to raise that issue rests with him. . . . The meaning must be that character is not an issue in the case unless the prisoner chooses to make it one."*

It is true that the court stated that such evidence was not evidence of the bad reputation of the defendants but a reading of the testimony of the witness Douglas Fyfe will show that the only purpose for which he was called as a witness was to give testimony with respect to these matters. In a case where defendants are jointly tried and indicted it must be apparent that for a witness to testify that such men were men of "very bad reputation" is equally damaging to all defendants on trial.

It is true that the court granted appellants' motion to strike the testimony that Wilkes was "an unscrupulous promoter" but this did not cure the error. *The court refused to strike the testimony that men of "very bad reputation were being brought into the company."* [R. p. 217.]

In the case of *Lockhart v. U. S.*, 35 F. (2) 905, this court had the following to say with respect to this matter:

> *"The question for decision therefore is this, may a court admit incompetent, prejudicial testimony before a jury and cure the error by withdrawing the testimony from the consideration of the jury at the close of the trial?* That this may be done as a

general rule is well settled; but there is an exception to the general rule as well established as the rule itself.

The exception is thus stated in Waldron v. Waldron, 156 U. S. 361, 383, 15 S. Ct. 383, 389, 39 L. Ed. 453: 'There is an exception, however, to this general rule, by virtue of which the curative effect of the correction, in any particular instance, depends upon whether or not considering the whole case and its particular circumstances, the error committed appears to have been of so serious a nature that it must have affected the minds of the jury despite the correction by the court.'

In Maytag v. Cummins (C. C. A.), 260 Fed. 74, 82, the court said: 'But there is an exception to this rule. It is that, where the appellate court perceives from an examination of the record that the inadmissible evidence made such a strong impression upon the minds of the jury that its subsequent withdrawal or the instruction to disregard it probably failed to eradicate the injurious effect of it from the minds of the jury, there the defeated party did not have a fair trial of his case, and a new trial should be granted.'

See, also, Rudd v. U. S. (C. C. A.), 173 Fed. 912; Quigley v. U. S. (C. C. A.), 19 Fed. (2) 756.

This case falls within the exception and not within the general rule. As already stated, the testimony wrongly admitted was highly prejudicial in its nature, and its effect could not be entirely eradicated from the minds of the jury by a simple instruction to disregard it.

It certainly cannot be said that such testimony would not unconsciously affect the verdict, however much the jury might be disposed to follow the instructions of the court.

See, also, Gee v. Fonk Poy, 88 Cal. 627."

See, also:

Sapp v. U. S., 35 F. (2d) 580 (C. C. A. 8);

Kuhn v. U. S., 24 F. (2d) 910 (C. C. A. 9);

Latham v. U. S., 226 F. 420;

Newman v. U. S., 289 F. 712.

Not only did the attempted withdrawal of this evidence from the jury not cure the error but the court emphasized the error by permitting the district attorney to read this stricken evidence to the jury, as will appear from the next argued specification of error.

Argument on Specification of Error No. XII.

The district attorney was guilty of prejudicial misconduct in reading to the jury testimony to the effect that appellant Wilkes was "an unscrupulous promoter," said evidence having been stricken from the record.

We have hereinabove pointed out the proceedings had in the opening argument of counsel to the jury where he was permitted to argue that the witness Wilkes had a reputation of being "an unscrupulous promoter" These are based on Assignments of Error Nos. 63 and 64 [R. pp. 1495 to 1499] and the proceedings with respect thereto appear in the record. [R. pp. 1262 to 1265.] Counsel immediately assigned the argument as

misconduct on the grounds that it was evidence that had been ordered stricken from the record, but the court said: "No. It will stand just as it is: That a statement made to those present—as to characterizing or giving his opinion as to the statement as to the reputation of Mr. Wilkes was properly in the record. Go on." [R. p. 1264.] Again the matter was called to the attention of the court and the court refused to rebuke the district attorney [R. pp. 1264 to 1265.], but rebuked defense counsel for assigning the argument as misconduct for the court said [R. p. 1266]:

> "Clearly, Mr. Wood, and I am sure that this is the rule, that counsel in arguing to the jury may indulge his own conclusions from what is shown in the evidence. I certainly would be sorry to think that there was any other rule in times past. *Now, don't interrupt. Please don't do that. Those interruptions are unseemly entirely.*"

Surely one can but conclude that the conduct of the district attorney, and that of the court, in permitting such argument was not an inadvertence but an intentional abuse of the rights of argument. The evidence as to Wilkes being an "unscrupulous promoter" and as to men of "very bad reputation being brought into the company" plainly had no place in the record. The matter was called directly to the court's attention with the request that the district attorney be rebuked for misconduct in arguing matters stricken from evidence. Under the authorities above quoted the prejudice was not only not removed but was emphasized by the remarks of the court.

In the case of *Volkmor v. U. S.*, 13 F. (2) 594 [C. C. A. 6] the court said:

> "Even if there had been no objection, it was the duty of the court, on its own motion, to reprove counsel and instruct the jury to disregard the remarks. This is not a case of inadvertence of statement, but of intentional abuse."

The court, referring to the case of *N. Y. Central v. Johnson*, 279 U. S., 310, 318 (73 L. Ed. 707), in *Read v. U. S.*, 42 Fed. (2) 636 at 645, said:

> "This was a civil action, and it is much more important that prejudice be not aroused in a criminal action than it is in a civil one. No exceptions were taken to the remarks of the prosecuting attorney, but, as held in the New York Central R. R. case, *supra*, where paramount considerations are involved, 'the failure of counsel to particularize an exception will not preclude this court from correcting the error.' This court in Van Gorder v. United States, 21 Fed. (2) 939, 942, said on this subject: 'In criminal cases involving the life or liberty of the accused the appellate courts of the United States may notice and correct, in the interest of a just and fair enforcement of the laws, serious errors in the trial of the accused fatal to the defendant's rights, although those errors were not challenged or reserved by objections, motions, exceptions or assignments of error.'"

In the case of *McKnight v. United States*, 97 F. 208 (C. C. A. 6) in an opinion rendered by Justices Taft, Lurton and Day, the district attorney made comments as to the lack of character of the defendant of a less aggra-

vated character than those in the present case. In that case the district attorney said:

> "That he (defendant) stands without a reputation in the community and that he stands without such good character."

The court reversed the case for this prejudicial argument saying:

> "It is the defendant's privilege, not his duty, to open by evidence the question of his character. The expense, the remoteness of witnesses, confidence in his case, and other considerations, would often dissuade him therefrom, however certain of success therein. Hence, and because the state may not show a character bad which the defendant has not put in issue, the omission of this evidence does not justify the presumption that it is not good; and neither counsel nor the judge has the right to argue to the jury that it does, nor should they assume anything against it while deliberating on their verdict.'
>
> To the same effect: State v. Upham, 38 Me. 261; Fletcher v. State, 49 Ind. 124; Stephens v. State, 20 Tex. App. 255; State v. Dockstader, 42 Iowa, 436; Ackley v. People, 9 Barb. 610; People v. White, 24 Wend. 520; People v. Evans, 72 Mich. 367, 40 N. W. 473; Pollard v. State (Tex. Cr. App.), 26 S. W. 70."

See, also:

Lowdon v. United States, 149 Fed. 673 at 677;

People v. Gleason, 122 Cal. 370.

Argument on Specifications of Error Nos. IX and X.

These specifications of error, *supra*, pages 91 and 92, deal with the court refusing to permit cross-examination of the witness Goshorn with respect to his testimony to the effect that these appellants had "realized" stock and money from "bonus" stock without giving any consideration therefor and as net profits.

Cross-examination Is Matter of Right.

It is error for the trial court to refuse to permit the cross-examination of a witness to extend to all matters germane to the direct examination as such cross-examination is a matter of absolute right and not a privilege.

Harold v. Oklahoma, 169 F. 47;

Houghton v. Jones, 1 Wall. 702 (17 L. Ed. 503).

Generally speaking when direct examination opens a general subject the cross-examination may go into any phase and cannot be restricted to mere parts which constitute a unity.

People v. Dole, 122 Cal. 483.

The refusal to allow cross-examination of a witness upon matters brought out in direct examination and relevant to the issue is a denial of an absolute right and has been generally held to be a sufficient ground for reversal or granting a new trial.

Reeve v. Dennett, 141 Mass. 207, 6 N. E. 378;

Martin v. Elden, 32 Ohio State 282;

Eames v. Kaiser, 142 U. S. 488 (35 L. Ed. 1091);

Prout v. Bernard Land, etc. Co. (N. J.), 73 Atl. 486;

Babirecki v. Virgil (N. J.), 127 Atl. 594 (39 A. L. R. 171).

In the case of *In re Mary Campbell,* 100 Vt. 395 (138 Atl. 725, 54 A. L. R. 1369), the court thus stated the rule:

> That which tends to *limit, explain or refute* statements of a witness on direct examination *or to modify the inferences deducible therefrom* comes within the range of proper cross-examination when the credibility of the witness is not involved. Thus far counsel may go as a matter of right.

In the case of *Alford v. U. S.,* 282 U. S. 687 (75 L. Ed. 624), it was held reversible error for the trial court to sustain an objection to a question asked of a prosecution witness "where do you live?" The court summarized the authorities holding that cross-examination of a witness is a matter of right; that it should be permitted to show the untruthfulness or biased character of the testimony of a witness and that cross-examination must necessarily be exploratory. In this connection the Supreme Court said:

> "It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. *Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them.* . . . (Citing cases.) *To say that prejudice can be estab-*

lished only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial. (Citing cases.) In this respect a summary denial of the right to cross-examination is distinguishable from the erroneous admission of harmless testimony. (Citing cases.)"

That the questions propounded to the witness Goshorn were clearly proper cross-examination must be apparent. The subject matter of his direct examination had to do with his conclusions based upon an examination of the books and records in evidence. He had testified that stock and money had been delivered to appellants without consideration and that the amount so "realized" was as a "bonus" and was all net profit. It was obviously within the scope of the cross-examination to question the witness with respect to the disposition of these moneys. It was proper to question him concerning the value of any services that had been rendered as consideration for the money and stock so received. It was proper to question him for the purpose of ascertaining whether this money which went into the profit and loss account had been subsequently returned to the McKeon Drilling Company or what had been done with it. It was proper cross-examination to examine this witness with respect to all of the items in the books of account upon which he had based his testimony. The undue restriction of this right of cross-examination constituted prejudicial error. The court ruled that counsel could not question the witness "with respect to any matters about any *costs, expenses, valuations of services or any other such thing which may*

go to constitute a proper charge or expense against this item of $578,260.63."

The bias and prejudice of the trial court in favor of the government accountant was clearly demonstrated but the law is well settled "that whatever may be the opinion of a judge as to the credibility of a witness he should permit full cross-examination of the witness without unnecessary interference."

York v. U. S., 299 F. 778.

Argument on Specification of Error No. XIII.

The court erred in proceeding with the trial after the presentation and filing of the affidavit of personal bias and prejudice as directed against the trial judge, the Honorable George Cosgrave, and verified by the defendant Siens, and joined in by appellants Shingle and Brown and others.

The analysis and argument contained in the McKeon brief, (pages 225 to 251), with respect to these proceedings is so clear, complete and logical that we deem it unnecessary to add thereto. We feel that the affidavit was plainly sufficient as a matter of law and that the facts therein stated, believed by appellants to be true, were sufficient to show a personal bias and prejudice on the part of the trial judge against appellants and in favor of the government. We therefore adopt the argument and analysis contained in the McKeon brief as part of this brief.

Arguments on Specifications of Error Nos. XIV, XV, XVI, XVII, XVIII and XIX.

The court erred in instructing the jury on matters of law and in refusing to instruct the jury as requested by appellant.

These specifications are all directed to the instructions given by the court or to those requested and refused; specification of error No. XIV covered by assignments of error Nos. 95 and 96 [R. p. 1527] covers the instruction given by the court with respect to the credibility of witnesses. As pointed out in the McKeon brief (pp. 380 to 384) the court instructed the jury in substance that the presumption is that a witness (and a defendant as a witness) is presumed to speak the truth, but that this presumption "may be *repelled* (1) *by his reputation for truth and integrity,* (2) by the *probability* of his testimony and (3) to the extent to which it is *corroborated* by known facts in the case" [R. p. 1527].

This instruction in effect advised the jury that if a defendant had produced evidence of his *good reputation* for truth and veracity (which Shingle and Brown did) such evidence would serve to *repel* the presumption that such defendant testified truthfully. The instruction in effect further advised the jury that the *"probability", not the improbability,* of a defendant's testimony served to rebut the presumption that he was telling the truth, and further that, if a defendant's testimony were corroborated by the known facts in the case *that corroboration* also would serve to rebut the presumption that the defendant and his witnesses were testifying to the truth.

At the oral argument the court questioned whether sufficient exception was taken to the erroneous instruction *given by the court* on the credibility of witnesses. We think that the exception was sufficient in view of the following:

1. Exception was taken to the refusal of the court to give the *requested correct instruction* No. 42 [R. p. 1319] in the following language [R. p. 1304]:

> "We except to the refusal of the court to give the following numbered instructions requested by the defendants for the reason that the matters therein suggested *are a proper statement of the law* and have not been by the court fully covered or presented to the jury in its given instructions and such instructions relate directly to the questions to be determined by the jury and are necessary to properly aid them in their determination of the questions submitted for their consideration."

After this exception was taken the court refused to correctly instruct the jury. The only other exceptions to the *instruction given* on this subject appear as follows [R. p. 1325]: "to each and every part of the charge", [R. p. 1327] to the good character portion of the given instruction and record page 1333 with respect to that portion of the instruction given upon the question of the falsity of the testimony of a witness "upon the grounds and for the reason that that is not a correct or unqualified statement of the law and omits all reference to the elements of wilfulness and lack of corroboration". The assignments of error appear in the record, p. 1527, A. E. Nos. 95 and 96. We think the matter was therefore, sufficiently called to the court's attention.

> *"An offer of a correct instruction on a particular issue should be considered as a specific objection to instructions given in conflict therewith."*
>
> 64 *C. J.* 951, Sec. 739, citing *Anglin v. Marr Canning Co.*, 237 S. W. 440.

In the case of *Sam Yick v. United States* (C. C. A. 9), 240 Fed. 60, certain requested instructions were refused and it was *"ordered that exceptions be and they hereby are noted herein to each and every of the instructions given by the court, and to the refusal of the court to give each and every of the instructions requested by the defendants, which the court refused to give."* In this connection *this court* speaking through Judge Ross held the exception sufficient, saying:

> *"The contention that the exception to the instruction was not sufficiently specific we think without merit.* . . . We are aware of the well-established rule that a general exception to a charge which does not direct the attention of the court to the particular portion or portions of it to which objection is made raises no question for review by the appellate court; the reason being that the attention of the trial court should be drawn to the portion or portions complained of, to enable the court to correct any error that it should find had been made."

And at pages 66 and 67 *this court* said:

> "It is thus seen that the defendants requested the court to instruct the jury . . . *The court,* according to the record that has been set out, *refused to so instruct the jury,* itself directed the entry of an exception on behalf of the defendants to the ruling, *and, to the contrary, in respect to the acts of the inspectors, distinctly instructed the jury* in effect that, if the government officers did instigate or induce the defendants to commit the offense alleged against them, it constituted no bar to the prosecution by the government, *to the giving of which latter instruction the court itself, according to the record, also directed the defendant's exception thereto to be entered."*
>
> *"We think that the attention of the court was by the proceedings above referred to, of necessity, called to the (in)correctness of the instruction given, and at the proper time excepted to, and that is here assigned as error."*

In *Anglin v. Marr Canning Co.* (Ark.), 237 S. W. 440 at 444, the Supreme Court of Arkansas said:

> "While the appellant failed to object specifically to some of these (incorrect) instructions, *prayer for instruction No. 2 offered by him was a correct instruction and in itself should be taken and considered as a specific objection to instructions which were given by the court in conflict therewith.* . . . the court . . . should have given appellant's prayer for instruction No. 2, because that instruction correctly declared the law. . . . If the court saw fit to give other instructions, on that issue, it should have made these instructions conform with the law as announced in instruction No. 2."

2. Since this court conceded at the oral arguments that the instruction given was plainly erroneous, this court should notice and correct the plain error in order that justice might be done.

In *Crawford v. U. S.*, 212 U. S. 183 (53 L. ed. 465, at 470), the Supreme Court said:

> *"In criminal cases courts are not inclined to be as exacting with reference to the specific character of the objection made as in civil cases. They will, in the exercise of a sound discretion, sometimes notice error in the trial of a criminal case, although the question was not properly raised at the trial by objection and exception.* Wiborg v. United States, 163 U. S. 632, 659, 41 L. ed. 289, 299, 16 Sup. Ct. Rep. 1127, 1197."

In the case of *Hicks v. United States,* 150 U. S. 442 (32 L. ed. 1137), the Supreme Court reversed the cause for the giving *of an erroneous instruction on the credibility of witnesses, although proper exception was not taken thereto.*

In the case of *Brashfield v. U. S.,* 272 U. S. 448, (71 L. ed. 345), the Supreme Court reversed the cause because the jury was polled, saying "the failure of petitioners' counsel to particularize an exception to the court's inquiry does not preclude this court from correcting the error."

In the case of *Read v. U. S.*, 42 Fed. (2) 636, at 645, the Court of Appeals for the Eighth Circuit, referring to the case of *N. Y. Central R. R. Co. v. Johnson*, 279 U. S. 301, at 318, said:

> "This was a civil action, and it is much more important that prejudice be not aroused in a criminal action than it is in a civil one. No exceptions were taken to the remarks of the prosecuting attorney, but, as held in the New York Central R. R. case, *supra*, where paramount considerations are involved, 'the failure of counsel to particularize an exception will not preclude this court from correcting the error.' This court in Van Gorder v. United States, 21 F. (2) 939, 942, said on this subject: *'In criminal cases involving the life or liberty of the accused the appellate courts of the United States may notice and correct, in the interest of a just and fair enforcement of the laws, serious errors in the trial of the accused fatal to the defendant's rights, although those errors were not challenged or reserved by objections, motions, exceptions or assignments of error.'*"

In the case of *Hersh v. U. S.*, 68 Fed. (2) 799, at 807, this rule was affirmed by this court speaking through Judge Wilbur, as follows:

> *"While this statement was not objected to at the time and no exception reserved thereto, because of it defendant Hersh was entitled to have the jury instructed, as requested, that the failure of the witness to take the stand should not count against him. This error was prejudicial as to Hersh. It is well settled in the federal court that where a correct proposition of law essential to the proper determination of the issues submitted to the jury is proposed by the defendants and the same is not given either in substance or effect, and the jury is not properly advised thereon by the general charge of the court, the refusal to give such instruction is error."*

Since the instruction was plainly erroneous we think the question was sufficiently reserved for consideration by this court.

We do not recall ever having seen a more misleading or prejudicial instruction than this given by the court.

Appellants, on the other hand, requested the court to instruct the jury in request No. 42 [R. p. 1319] and excepted to the refusal to give this instruction [R. p. 1304]. This requested instruction is that which is embodied substantially in the California Code of Civil Procedure, Sec. 1847, which provides that a witness is presumed to speak the truth, but that this presumption may be repelled (1) "by the manner in which he testifies (2) by the character of his testimony, or (3) by evidence *affecting* his character for truth, honesty or integrity, or (4) his motives, or (5) by contradictory evidence." This requested instruction was obviously a correct statement of the law, while that given by the court was exactly an incorrect statement of the law.

When proper request is made it is the duty of the court to clearly and fully advise the jury of the rules for determining or testing the credibility of witnesses and the weight to be attached to their testimony, and such instructions should not be misleading or confusing (16 *C. J.* 1013-1014, Sec. 2439-2440; *Hersh v. U. S.* (C. C. A. 9), 68 F. (2) 799).

Under this rule and the authorities cited in the McKeon brief (pp. 385 to 387) the court erred in the above instructions given and in refusing the instructions requested.

The error of the court in refusing to give the instructions requested and in giving those covered by specifications of error No. XV [A. E. 93, R. 1525; A. E. 94, R. 1526]; XVI [A. E. 114 and 115, R. 1545]; XVII [A. E. 105, 109, 110, R. 1536 to 1537, 1538 to 1540]; XVIII [A. E. 114, 115, R. 1543 to 1545], will now be considered.

Argument on Specification of Error No. XV.

The refusal of the court to properly instruct the jury as requested with respect to the consideration of the corporate books of account and records and the error of the court in the instruction given by it are fully argued in the McKeon brief (pages 283 to 285) under specification of error No. 5, and the authorities therein cited (pages 277 to 282) are hereby adopted without further argument [A. E. 93 and 94; R. pp. 1525-6.]

Argument on Specification of Error No. XVI.

In the case of *Hersh v. U. S., supra,* this court at page 807, enunciated the following rule with respect to instructions:

> "It is well settled in the federal court that where a correct proposition of law essential to the proper determination of the issues submitted to the jury is proposed by the defendants and the same is not given either in substance or effect, and the jury is not properly advised thereon by the general charge of the court, the refusal to give such instruction is error. Hendrey v. U. S. (C. C. A.), 233 F. 5, 18; Calderon v. U. S. (C. C. A.), 279 F. 556. In the case at bar we hold that the broad general statements of the court in its instructions concerning concealment were entirely inadequate to properly advise the jury of the rights, duties and obligations of the defendant and upon what constituted the crime of concealment under the peculiar circumstances of this case."

We shall test the requested instructions with this rule in mind to ascertain whether or not the court fully and properly instructed the jury upon the issues presented.

The Court Erred in Failing and Refusing to Properly Instruct the Jury With Respect to the Relations Between Directors and Their Corporation.

The request contained in Assignment of Error No. 114 [R. p. 1543], refused by the court and exception noted [R. p. 1304] is in part as follows:

> "You are instructed that a director of a corporation may advance money to it, may become its creditor, may take from it a mortgage or other security, and may enforce the same like any other creditor, subject only to the obligation of acting in good faith. It is not a fraud upon the corporation or its stockholders for a director to fail to disclose to the corporation or to the other directors, that he is the real lender, where the loan is nominally made by another person or by a syndicate of which the director was a member. In the absence of proof of bad faith it was not a fraud upon the Italo Petroleum Corporation of America for any director of the Italo Petroleum Corporation of America to be a member of the syndicate which loaned $80,000 to the Italo Petroleum Corporation of America; nor was it wrongful for him to fail to disclose this fact to the corporation or its stockholders."

The propositions of law contained in this requested instruction are fully supported by the following cases:

Castle v. Acme Ice Cream Co., 101 Cal. App. 94 at 101;

O'Dea v. Hollywood Cemetery Assn., 154 Cal. 67;

Schnittger v. Old Home Etc. Mining Co., 144 Cal. 603 at 606.

Under the issues raised by the pleadings the propriety of officers and directors being members of a syndicate which loaned money to the corporation was a fact in issue to be determined by the jury. The court did not in substance or effect give any instruction upon this proposition. [See R. pp. 1295 to 1297.] In view of the fact that the indictment alleged that it was "wrongful" for defendants to lend $80,000 to the corporation and that defendants "wrongfully" received a bonus therefrom this requested instruction should have been given. Although the evidence disclosed that the $80,000 loan cost Italo $80,000 plus lawful interest and that neither Italo nor its stockholders were defrauded by reason of this loan, the propriety of defendants being members of the syndicate was directly tendered by the indictment, was met by evidence presented by the defendants, and the jury should there have been instructed as to the law applicable thereto.

The Court Erred in Refusing to Instruct the Jury That the Par Value of Stock Was Not Presumed to Be Its Actual Value.

This requested and refused instruction [A. E. 115; R. p. 1545] advised the jury that there was no presumption that corporate stock was worth its par or face value, nor that such value was the real value, and the fact that the price paid by the Big Syndicate for 6,000,000 shares of Italo stock was not the same as the par value or may have been less than the par value did not make the transaction illegal or fraudulent. These propositions at law are settled by the case of *Castle v. Acme Ice Cream Co., supra,* and the rule as announced in 14 *Corpus Juris,* page 718, Section 1099.

Inasmuch as the indictment alleged that it was part of a fraudulent scheme for the Big Syndicate to purchase 6,000,000 shares (3,000,000 units) of Italo $1.00 par value stock for $3,500,000, this requested instruction was directly in point and should have been given. The jury not having been so instructed undoubtedly thought that the difference between the par value and the sale price of the stock constituted fraud. Inasmuch as appellant Shingle was Syndicate Manager and these appellants were convicted on a count relating to the Syndicate affairs the failure of the court to give this requested instruction was particularly damaging.

The Court Erred in Instructing the Jury With Respect to a Matter of Which the Court Had Personal Knowledge on a Matter Not Within the Issues of the Case.

In giving this requested instruction [A. E. 105 R. 1536-1537], the court drew upon some incident of which it had personal knowledge which was in no way analogous to the facts in the present case. The judge told the jury that a prominent business man whom the judge knew, had been president of a life insurance company and had received a percentage of the profits of a brokerage firm which acted as fiscal agent in the sale of the life insurance company's stock, and that he, the president of the company, was required to repay this money to the company. Undoubtedly the court was referring to his personal knowledge of the parties involved in the case of

Western States Life Insurance Co. v. Lockwood, 166 Cal. 185.

In the present case Shingle, Brown & Company was a brokerage firm. It had no contract for the sale of Italo stock. It did not have any contract to pay and did not pay any Italo officers or directors any percentage of any profits derived by it from the sale of Italo stock. Hence the illustration used by the court had no application to the facts in the case. The fact that the court here referred *to the president* of the company and *to a brokerage firm* undoubtedly led the jury to believe that Shingle, Brown & Company was being referred to and that Shingle, Brown & Company owed a fiduciary duty to the company and was required to account for profits made by it. Such was not the case and the instruction given was in our opinion clearly misleading and inapplicable.

Defendants on the other hand requested the court to instruct the jury with respect to transactions between corporations and directors in which the property of directors was involved. These requests [A. E. 108, 109 and 110; R. p. 1539], embody the principle announced in California Civil Code, Section 311. The court refused to give this instruction and gave the instruction just referred to in whch it assumed that any profit made by a director from a sale of his property to the corporation was a "secret profit" even though the transaction was as to the corporation just and equitable. (See authorities McKeon Brief, Points XVII to XIX.)

The Court Erred in Refusing to Instruct the Jury With Respect to the Values of the Properties Acquired by Italo.

It will be remembered that the indictment alleged that Italo acquired the Brownmoor and McKeon companies' assets at considerations "far in excess of their actual value." These were material allegations which the government was required to prove to sustain its case. No evidence whatsoever was produced by the government to show what the actual value of such assets was. Italo paid Brownmoor 600,000 units of its stock having a par value of $1.00 per share and assumed $100,000 of Brownmoor indebtedness. As pointed out *supra* (pp. 15-16), at the time of this transaction Italo's stock was selling for $1.27 per unit. It was shown by the evidence that Dr. E. A. Starke appraised the Brownmoor assets at $4,225,835.00 value, and that D. R. Thompson appraised these assets at $2,984,000 value. If it be assumed that the Italo stock was worth its face value, it is clear upon the basis of these appraisals that the assets acquired were worth more than the stock paid therefor.

As pointed out in the McKeon brief the same situation exists with respect to the McKeon assets acquired by Italo. Such assets were of a value far in excess of the stock and cash consideration which Italo agreed to pay therefor. With respect to these transactions the defendant therefore requested the court to instruct the jury with respect to the value of the properties and the value of the capital stock. [A. E. 108, 109 and 110.] These requests were refused and exception noted. [R. p. 1304.] The court gave no similar instruction.

Since the question of value was directly alleged by the government in the indictment the court should have instructed the jury on the law with respect thereto.

It should be clear that the properties acquired by Italo were fairly worth more than Italo paid therefor. There was no secrecy whatsoever as to the fact that R. S. McKeon, a director of Italo, was interested in the McKeon company because he explained this interest to the Italo directors.

In our opinion the failure and refusal of the court to clearly and fully instruct the jury on the law governing the propositions herein referred to was prejudicial and requires reversal.

(See cases cited in McKeon brief, pages 385 and 386.)

Argument on Specifications of Error Nos. XX and XXI.

The evidence was insufficient to justify the verdict of conviction upon the twelfth count of the indictment and the court erred in failing and refusing to instruct the jury to return a verdict of not guilty, in denying appellants' motion for a new trial and in arrest of judgment made upon this ground.

These two specifications of error may be argued together.

The evidence in this case shows that Shingle, but not Brown, was a member of the syndicate which loaned Italo $80,000.00 and that this loan was repaid by Italo with lawful interest. Vincent & Company paid the syndicate, as hereinabove pointed out, 80,000 shares of Brownmoor stock as part of the consideration for the loan. The

mere statement of this proposition shows that the transaction was not a fraud on Italo and that the members of the syndicate, particularly those who were not officers or directors of the Italo company, were not guilty of any fraud by reason of being syndicate members.

As hereinabove pointed out neither Shingle nor Brown had anything to do with the Brownmoor-Italo purchase. Vincent, who held options to purchase 950,000 of the 1,000,000 issued Brownmoor shares, paid to Shingle, Brown & Company $83,000 out of the gross profit of $904,500 made by him on his Brownmoor stock options. This was obviously not a fraud on Italo or its stockholders.

If any one was chargeable with fraud in this transaction it was Frederic Vincent and George Stratton who, while fiscal agents of the Italo company, acquired options on the Brownmoor stock knowing that Italo proposed to acquire the Brownmoor properties and then sold the stock at a profit to themselves. Neither Shingle nor Brown had any knowledge whatsoever of the Vincent transaction. The evidence shows that Italo purchased the Brownmoor assets appraised at $4,225,835.00 by Dr. Starke and $2,984,400.00 by D. R. Thompson in return for the issuance of 600,000 units of Italo stock of a market value of $765,000, *supra,* p. 16. Shingle and Brown were entire strangers to the transaction. The stock issued by Italo to Brownmoor for these assets was distributed to the nominees of Frederic Vincent & Company who owned or controlled 950,000 of the 1,000,000 outstanding shares. There is no contention that the Brownmoor stockholders were damaged in this transaction.

As above pointed out Shingle and Brown were not charged in the indictment or bill of particulars with participating in the McKeon-Italo transaction, or in the alleged secret arrangement and agreement with respect thereto, or in profiting therefrom. Hence this "part" of the alleged scheme should be eliminated as to them. But had they been charged therewith in the indictment, their conduct as shown by the evidence, was above reproach. They merely held the stock issued by the Italo Company and delivered by it to the McKeon Company as an escrow holder and distributed that stock in accordance with the instructions given by the McKeon Drilling Company, the owner of that stock. Neither they nor any bank or trust company holding such stock as escrow holder could have done otherwise. On this subject the government witness Goshorn testified [R p. 662], "From my examination of the escrow records I know that that stock was held by Shingle, Brown & Company *solely as an escrow holder to be distributed by it pursuant to any instructions received by it from the McKeon Drilling Company. I found from my examination of the books and records in evidence that the stock was distributed pursuant to written orders given either by the McKeon Drilling Company or one of the three McKeon brothers,* and that in each instance when any stock was distributed out of that escrow it was done pursuant to written order and a receipt was taken therefor".

We may entirely disregard the alleged payment of illegal dividends by Italo-American in so far as Shingle and Brown are concerned because these transactions took place in 1926 more than two years before either Shingle or Brown ever heard of said company.

No Fraud in Big Syndicate.

The only remaining part of the alleged scheme to defraud is the "Big Syndicate." The indictment alleges that the fraud in the Big Syndicate consisted in the syndicate buying 3,000,000 units of Italo stock from the Italo Company for $3,500,000 or at an average price of $1.16⅔ per unit net to the Italo company. This price was in line with the price at which even small lots of stock were being sold by Italo to Frederic Vincent & Company at that time, which was $1.27½ per unit. [R. p. 904.] The syndicate agreement was submitted to and approved by the Corporation Commissioner. [R. pp. 303 and 975.] It is, of course, common practice in all businesses to sell commodities in large quantities at cheaper prices than sales in small quantities. The syndicate paid to the Italo trustee $3,500,000 and the trustee expended the money on behalf of the Italo company, thereby enabling Italo to meet its cash obligations on property purchase contracts and avoid the loss of these admittedly valuable properties on which payment had already been made. [R. pp. 905-906.] The syndicate fully performed its obligation to the Italo company and received a full release and acquittance from Italo and the trustee on December 20, 1928. [Exhibits 83 and 84; R. p. 917.]

According to the allegations of the indictment [R. p. 33] the government claims that the syndicate was a fraud on Italo and its stockholders because the syndicate members bought 6,000,000 shares (3,000,000 units) of Italo stock for $3,500,000 and wrongfully received profits as members of said syndicate derived from the sale of the 3,000,000 units of stock. *There is no allegation in the indictment that it was part of the scheme to defraud the*

syndicate members and the charge that the syndicate members profited by reason of their participation therein proved false. In fact the syndicate members received back only 52% in cash of their cash investment in the syndicate. [R. pp. 928-9.] Hence the indictment allegation with respect to this matter must resolve itself into an allegation of fraud because the syndicate members expected to derive a profit from their syndicate participation. It must be apparent that since the syndicate was not a fraud on Italo or its stockholders the fact that the syndicate members profited or lost from the syndicate operation would be immaterial. Admittedly the syndicate members expected to profit or they would not have subscribed to the syndicate. There were seventy-two syndicate members of whom fourteen were officers or directors of Italo company and the remainder including Shingle and Brown were not officers and directors of the company.

The syndicate began in June, 1928, and by December 20, 1928, had paid to the Italo trustee $3,500,000 which money was used by the trustee for the benefit of the Italo Company and the relationship between the syndicate and the Italo or Italo trustee was fully terminated on and before December 20, 1928. On December 20, 1928, the syndicate manager received a full and complete release from the Italo and its trustee and an acknowledgment that the syndicate had fully and completely performed its obligations. (Exhibits 83 and 84.) Obviously therefore had the syndicate been a fraud on Italo that fraud must have been committed when the syndicate was formed in June, 1928, and the syndicate agreed to buy the Italo stock, or between that date and December 20, 1928, when the relations between Italo and the syndicate terminated.

By no stretch of the imagination could the alleged fraudulent scheme with respect to the syndicate have extended beyond December 20, 1928, because on that date the relations between Italo and its stockholders and the syndicate were terminated by complete consummation of the syndicate contract.

O. J. Rohde was a member of the syndicate to the extent of a $5,000 subscription and he became such at the solicitation of the defendant Siens. He, of course, like other syndicate members, expected to profit from his syndicate subscription. [R. p. 577.] If the hope of profiting from participation in the syndicate was fraudulent Rohde was as much or as little a party to a scheme to defraud as were these appellants and other syndicate members, who were not fiduciaries of Italo. These two appellants lost thirteen times as much as Rohde, by reason of their syndicate subscription, because they subscribed thirteen times as much thereto.

The foregoing summary of the evidence which appears in the record clearly shows that these appellants were not guilty of being members of a fraudulent scheme, if any there was, and that the court should have granted their motion for an instructed verdict of not guilty. The evidence with respect to them was clearly as consistent with innocence as with guilt, and therefore an instructed verdict of not guilty should have been granted.

Karchner v. U. S., 61 F. (2) 623;

Gold v. U. S., 36 F. (2) 16, 32.

12th Count Letter Not in Furtherance of Fraudulent Scheme.

The twelfth count letter was a letter *mailed* to the witness Rohde, *a syndicate member,* on January 23, 1929, at San Francisco in response to an inquiry from him. [R. pp. 580-581.] The letter related solely to the *syndicate affairs*, that is, the relations *between the syndicate and its members* and had no possible relation with or reference to the Brownmoor deal, the $80,000 loan, or the purchase of the McKeon assets by the Italo, these transactions having long since been consummated. We must remember that the syndicate-Italo relationship terminated December 20, 1928. The twelfth count letter was mailed in San Francisco January 23, 1929, more than a month later. We therefore contend that the letter could not have been for the purpose "of executing" the alleged scheme to defraud.

Belden v. U. S. (C. C. A. 9), 223 Fed. 726, 729.

No citation of authority is necessary for the proposition that in a prosecution under the mail fraud statute, the *first burden* of the government is to prove that the scheme alleged in the indictment is a fraudulent one. Unless the scheme alleged and proven is fraudulent the use of the mails becomes immaterial. If the scheme proven *is not fraudulent no crime results* even though the mails are used. (*Karchmer v. U. S., supra.*) But if the government proves the alleged scheme and proves that it was fraudulent, the proof must then show the participation of each

defendant therein. If the government proves part of the scheme and fails to prove part of it as to a particular defendant, *it must prove that the part that it has established was fraudulent* and that each defendant participated therein, and, *with respect to the use of the mails it must further prove that the letter mailed was for the purpose of executing that part of the scheme which it has proven fraudulent as to each particular defendant,* for if the letter was only in furtherance of the unproved portion of the scheme no conviction could result for lack of a fraudulent scheme.

It is clear from the statute itself that *the mails must have been used during the existence of the fraudulent scheme proved and for the purpose of executing it. (Belden v. U. S., supra.)* If the scheme is divided into parts, such as we have here, and all of these parts were performed before the letter was mailed, no crime results. If parts of the scheme were executed and some parts unexecuted when the mails were used *there must be a clear relation between the executed and unexecuted parts and the letter must have been mailed to execute the unexecuted part.* In this case, therefore, the only possible part of the alleged scheme to which the twelfth count letter could relate is the Big Syndicate which, as above pointed out, completely concluded its relationship with the Italo on or before December 20, 1928.

The law is well settled that the indictment letter must be mailed *during the existence* of the alleged part of the

scheme to defraud to which it relates and be for the purpose of executing it.

Belden v. U. S., supra;
Lonabaugh v. U. S., 179 Fed. 476;
U. S. v. Jones, 10 F. 469;
49 *C. J.* 1212, Sec. 221;
Salinger v. U. S. 23 F. (2) 48;
U. S. v. McLaughlin, 169 F. 305 at 307;
Stewart v. U. S. 119 F. 89 at 95;
Stewart v. U. S. 300 F. 769;
McLendon v. U. S. 2 F. (2) 660.

Therefore the government must here show that the syndicate *was a fraud on Italo, that the letter was mailed while the Italo-Syndicate relations existed, and that the letter was for the purpose of executing the scheme by which the Syndicate was to defraud Italo.*

See cases cited *supra* and
Barnes v. U. S. 25 F. (2) 61;
U. S. v. Ryan, 123 F. 634.

In the case of *Stewart v. United States,* 119 F. 89 (C. C. A. 8), *supra,* the alleged scheme to defraud was that the defendant should induce, by the use of the mails, persons to come to a designated city for the purpose of then defrauding them by betting on races. The letter pleaded in the indictment was mailed *after* one of these persons had been already induced to come to this city and after he had wagered his money and sustained his loss. *The court therefore held that such letter having been mailed after the accomplishment of the alleged scheme*

could not have been for the purpose of executing it and that a conviction could not be sustained.

In *McLendon v. U. S.* (C. C. A. 6) *supra*, the court said

> *"The letter which constitutes the misuse of the mails must be a step in the attempted execution of the scheme charged in the indictment.* . . . and if the letter could have no effect direct or indirect in furthering that scheme even though the particular transaction may be dishonest in some other way, guilt of the crime charged is not made out."

It must follow from the above that the letter pleaded in the twelfth count of the indictment *was not mailed during the existence* of any relations between Italo and the Syndicate and could therefore not have been mailed for the purpose of consummating, or with relation to, any transaction which had already terminated, and therefore the letter was not mailed for the purpose of executing the alleged scheme to defraud and the cause should be reversed with instructions to dismiss.

Conclusion.

The record in this case is so full of prejudicial reversible error that it is difficult to determine which errors should be urged on appeal and which omitted without having a brief of inordinate length. We urge upon the court that it first consider the statement of facts contained in the McKeon brief and then consider the facts as hereinabove set forth with relation to the appellants Shingle and Brown. We adopt herein without further argument the assigned and specified errors argued in the brief of the appellants McKeon and those of the other appellants herein insofar as they apply to appellants Shingle and Brown.

We believe, from the foregoing, that it has been conclusively established that this cause must be reversed as to Shingle and Brown for the following reasons:

1. Because the twelfth count of the indictment *does not allege a public offense* cognizable by the United States District Court for the Southern District of California, and if it does the court failed to instruct the jury on the law with respect thereto.

2. Because *the court erred in admitting evidence against them which should have been excluded by reason of the restrictions contained in the bill of particulars.*

3. Because the court erred *in refusing to instruct the jury* not to consider evidence against these appellants *with respect to transactions that they were excluded in the bill of particulars from having participated in.*

4. Because the court *erred in proceeding with the trial after the filing of a legally sufficient affidavit of personal bias and prejudice.*

5. Because the court erred in *permitting the jury to receive evidence out of court* after it had retired to deliberate verdict.

6. Because the court erred in admitting in evidence books of account and records of corporations, with which these appellants had no connection and of which they had no knowledge, and the prejudicial conclusions and statements of the government accountants based on these records and other records which were not in evidence.

7. Because the court erred in unduly restricting the right of cross-examination.

8. Because the court erred in the instructions given to the jury and refusing to give instructions which correctly stated the law.

9. Because the court erred in admitting evidence of bad reputation before the evidence of good reputation had been admitted, and in permitting the District Attorney to argue upon evidence that had been stricken from the record.

10. Because the evidence was legally insufficient to sustain a verdict and because the letter pleaded in the count upon which appellants were convicted was not a letter mailed or delivered for the purpose of executing the alleged scheme to defraud.

The reversal of this case for insufficiency of the indictment and evidence should be with instructions to dismiss.

Respectfully submitted,

J. E. SIMPSON,
W. E. SIMPSON,
H. L. CARNAHAN,
Attorneys for Appellants
Fred Shingle and Horace J. Brown.